Supreme Court, U.S.
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NO. _____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1996

EUJENIO R. SANCHEZ
Petitioner

v.

ECTOR COUNTY, TEXAS, ET AL.
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Question Presented No. 1

Is a trial judge's intentional interference in the attorney -client relationship a judicial function for which the judge is absolutely immune?

Question Presented No. 2

Did the trial court err in applying a heightened pleading requirement for official immunity purposes under Federal Rule of Civil Procedure 7(a) so as to violate the standard of review under Federal Rule of Civil Procedure 12(b).

Question Presented No.3

Did the trial court err in granting Respondents' motions to dismiss for failure to state a claim because the court misapplied the standard for finding that official immunity applies to each Respondent's acts related to Petitioner's criminal conviction and imprisonment?

Question Presented No. 4

Did the trial court err in dismissing Petitioner's section 1983 conspiracy claims against Respondent because the facts pleaded establish that each of Respondents engaged jointly in post-conviction failures to disclose and concealments of material facts that would have entitled Petitioner to a new trial as a result of his appeal and his first and second applications for a state writ of habeas corpus.

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Citations to Opinions Below

The trial court's Order Granting Defendants' Motion for Dismissal is not reported and is included in the Appendix.

The decision without opinion of the United States Court of Appeals for the Fifth Circuit is reported at 103 F.3d 332 (Table)(5th Cir. 1997) and is included in the Appendix.

Statement of Jurisdiction

The order sought to be reviewed was entered on February 10, 1997. Jurisdiction to review this order on a writ of certiorari is conferred on this Court by 28 U.S.C. § 1254(1).

Statutes and Regulations Involved

The statutes and regulations involved in the case are the following:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983

(2) Obstructing justice; intimidating party, witness, or juror. If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the

United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

42 U.S.C. § 1985(2)

(3) Depriving persons of rights or privileges. If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State of Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having an exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action

for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

42 U.S.C. § 1985(3)

(B) A public prosecutor or other government lawyer in criminal litigation shall make timely disclosure to counsel for the defendant, or to the defendant if he ha no counsel, of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment.

Tex. Gov't Code Ann., tit. 2, sub tit., G app. (Vernon 1992)(State Bar Rules art. X, Section 9)(Tex. Disciplinary R. Prof. Conduct 7-103(B) (1989)

Each district attorney shall represent the State in all criminal cases in the district courts of his district and in appeals therefrom, except in cases where he has been, before his election, employed adversely. When any criminal proceeding is had before an examining court in his district or before a judge upon habeas corpus, and he is notified of the same, and is at the time within his district, he shall represent the State therein, unless prevented by other official duties. It shall be the primary duty of all prosecuting attorneys, including any special prosecutors, not to convict, but to see that justice is done. They shall not suppress facts or secrete witnesses capable of establishing the innocence of the accused.

Tex. Code Crim. Proc. art. 2.01 (1996)

The prosecutor in a criminal case shall:

(a) refrain from prosecuting or threatening to prosecute a charge that the prosecutor knows is not supported by probable cause;

(b) refrain from conducting or assisting in a custodial interrogation of an accused unless the prosecutor has made reasonable efforts to be assured that the accused has been advised of any right to, and the procedure for obtaining, counsel and has been given

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reasonable opportunity to obtain counsel;

(c) not initiate or encourage efforts to obtain from an unrepresented accused a waiver of important pretrial, trial or post-trial rights;

(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal; and

(e) exercise reasonable care to prevent persons employed or controlled by the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.07.

Tex. R. Disciplinary P. 3.09 (1992)

STATEMENT OF THE CASE

This lawsuit was filed under Title 42 U.S.C. § 1983 alleging the violation of Sanchez's civil rights by those involved in his state criminal proceeding. Sanchez also claimed several violations of Texas state law.

Each of the Respondents asserted that he was entitled to either absolute or qualified immunity. Judge Connally, Ector County, Texas, the Office of the District Attorney of Ector County, Preston Stevens, and Louis Orras filed Motions for a Rule 7 Reply pursuant

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to Schultea v. Wood, 47 F.3d 1427 (5th Cir. 1995). Sanchez filed a comprehensive brief on official immunity on October 20, 1995 which responded to the immunity claim of each Defendant. The trial court considered Petitioner's pleadings to be expanded by his brief on official immunity and the attached affidavits and state court records. Order, p.7, Appendix. On December 20, 1995, the magistrate granted each of the Defendants' Motions to Dismiss for Failure to State a Claim pursuant to Fed. R. Civ. Proc. 12(b)(6).

The factual allegations that overcome Defendants' claims of immunity are found in paragraphs 13-51 of Plaintiff's First Amended Complaint. (Vol. 3, pp. 580-600, Appendix.) The factual allegations in Sanchez's pleadings are summarized below.

On December 3, 1986, Defendant Louis Orras, working as an undercover police officer, approached Reymundo Canava to purchase a "paper" of heroin for $25.00. The transaction occurred in front of Reymundo Canava's residence, in an automobile furnished by Orras, and was under surveillance by other police officers 200 to 300 yards away. In the course of the transaction, Sanchez arrived at Canava's

residence in a yellow Cordoba automobile. Canava then got out of Orras' car and got into Sanchez's Cordoba. Sanchez then purchased a "paper" of heroin from Canava for $25.00. Although Orras and the officers who were conducting surveillance did not see exactly what occurred in the Cordoba, they did see Canava and Sanchez exchange something. After Canava got out of Sanchez's Cordoba, Sanchez departed and Canava returned to Orras' vehicle and sold heroin to Orras. On or about February 11, 1987, both Canava and Sanchez were arrested for the sale of heroin to Orras.

Canava was tried and convicted on July 22, 1987, in cause number C-18,564 for the sale of heroin to Officer Orras on December 3, 1986. District Judge Tryon D. Lewis presided over Canava's trial. Canava's testimony at trial consisted of only twenty-one lines and did not implicate Sanchez in any way regarding the sale of heroin to Orras.

On or about February 4, 1988, Sanchez was also tried for the sale of heroin to Officer Orras on December 3, 1986. District Judge Joe Connally, of the 244th Judicial District Court of the State of

Texas presided over Sanchez's trial and John Smith was Sanchez's counsel for such trial. At trial, Sanchez sought to have Canava called to testify that Sanchez did not participate in the sale of heroin from Canava to Orras. On the record of Sanchez's trial, presiding Judge Connally represented that he had presided over Canava's trial, and that based on Connally's knowledge of Canava's testimony, Canava's testimony would hurt Sanchez's case. As if to confirm his misrepresentations, Connally took judicial notice of the contents of Canava's trial folder, Cause Number C-18,564, and told Sanchez "you can take my word for it that Mr. Canava's testimony does not help you but in fact hurts your case . " In fact and unknown to Sanchez at this time, Judge Lewis, not Connally, presided over Canava's trial. Equally untrue and unknown to Sanchez, Canava did not offer testimony at trial which incriminated Sanchez, but rather never mentioned Sanchez in his 21 lines of testimony during which he claimed his privilege not to testify. See Appendix (excerpts from official court transcripts have been lodged with the Clerk of the Court and are listed on the List of Appendices), Vol. 5, pp. 1052-1054. In

fact, Canava later submitted an affidavit to the effect that on December 3, 1986, Canava had not purchased heroin from Sanchez, but instead had sold heroin to him. *See* Appendix.

Sanchez's desire to call Canava as a witness in his defense led to a hearing before Judge Connally. Instead of ruling on whether Sanchez should be allowed time to retain new counsel, Judge Connally stated to Sanchez and his counsel, Defendant John Smith, how Canava had testified at his own trial and how that testimony would be harmful to Sanchez. Despite Sanchez's instructions and pleas to the contrary, his counsel, Defendant John Smith, agreed with Judge Connally and refused to call Canava to testify.

Defendant Preston Stevens, Assistant District Attorney for Ector County, was the prosecutor for Sanchez's trial. In the course of the trial, Defendant Stevens knowingly or recklessly elicited perjured testimony from Defendant Orras regarding the circumstances of the December 3, 1986 transactions. At trial, Orras testified, in effect, that he had witnessed Sanchez sell heroin to Canava. However, this was contrary to the facts and Orras' previous testimony in Canava's trial.

Although Orras altered his testimony regarding circumstances directly related to Sanchez's convention, Orras' testimony was substantially similar in both trials regarding immaterial details.

On information and belief, Sanchez alleges that Defendant Stevens knew, prior to the commencement of Sanchez's trial that the facts that Orras proffered to him as his trial testimony in Sanchez's prosecution were materially different from his Canava trial testimony because Stevens prosecuted Canava as well as Sanchez. Stevens was also aware that Judge Lewis had presided over the Canava trial and that Canava had not testified to implicate Sanchez in this trial. He also knew that Judge Connally had not presided over that trial or heard Canava's testimony as he represented to Sanchez. His silence in the face of Defendant Connally's statements about Canava's testimony and its adverse implications for Sanchez's defense, amount to a ratification and condonation of Connally's statements. Appendix, Plaintiff s First Amended Complaint, ¶¶ 36-42, (Vol. 3, pp. 580-600).

As a direct result of Defendants' actions, on February 4, 1988 Sanchez was tried and convicted of the sale of heroin to Officer Orras

on December 3, 1986; a crime which Sanchez never committed. Sanchez was sentenced to life imprisonment. These entire proceedings--jury selection, trial, conviction, punishment hearing, and sentencing--were concluded by 5:00 p.m. on February 4, 1988.

At the hearing on Sanchez's Motion for New Trial, Defendant Connally again made false statements concerning Canava's testimony and Defendant Stevens again took no action and by his silence ratified Defendant Connally's misstatements. See Appendix, Vol. 5. pp. 987-1028.

On Sanchez's first petition for state habeas corpus, the Criminal Court of Appeals remanded the case for findings of fact and conclusions of law and an affidavit by Sanchez's trail counsel. See Record, Vol 5, pp. 1029-1030 and Vol. 5, pp. 1031-1033. Defendant Connally and John Smith, Sanchez's criminal defense counsel continued to perpetrate the false version of Canava's trial testimony and the lie that it would inculpate Sanchez.

Sanchez's petition for federal habeas corpus took the case out of Defendants Connally's and Stevens' hands with the result that the

State, now represented by the Attorney General's office, did not contest Sanchez's right to a new trial under the circumstances presented in his petition for federal postconviction relief, which had also been presented in his second petition for state habeas corpus. Vol. 5, p. 964.

After being incarcerated for over five years, the action was finally terminated in favor of Sanchez and an order of Dismissal was entered in Cause No. C-18,541 in the 244th Judicial District Court on or about May 10, 1994.

REASONS FOR GRANTING

Question Presented No. 1

Wrongful denial of the assistance of counsel will support a claim under Section 1983.[1] Moreover, it has been clearly established that the relationship between attorney and client is a protected one into which the government must not intrude. For example, the Court has held that a trial court's order preventing a defendant from

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[1]Davis v. Turner, 197 F.2d 847 (5th Cir. 1952).

consulting his counsel during a 17-hour overnight recess deprived him of effective assistance of counsel under the 6th Amendment.[2] Courts have also held in several contexts that government intrusion, either by guile through undercover informants attending meetings between the lawyer and client[3] or by direct meetings with a client without defense counsel's knowledge[4] or permission,[5] raises an issue as to whether 6th Amendment rights have been violated. The defendant then has the burden of showing prejudice: that there has been a "realistic possibility of injury" to the defendant or a "benefit to the state."[6]

Respondent Connally intruded into the conflict between attorney and client with the giving of false opinions as to whether or

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[2]Geders v. United States, 425 U.S. 80 (1976).

[3]Weatherford v. Bursey', 429 U.S. 545 (1977); United States v.Mastroianni, 749 F.2d 900 (1st Cir. 1984).

[4]Cinelli v. City of Revere, 820 F.2d 474 (1st Cir. 1987).

[5]United States v. Morrison, 449 U.S. 361 (1981).

[6]Cinelli, 820 F.2d at 477 citing Morrison, 449 U.S. at 366; Weatherford, 429 U.S. at 558; Mastroianni, 749 F. 2d at 907.

not Sanchez should exercise his right to obtain a particular witness in his defense. His motives are irrelevant at this point;[7] his purpose was to overcome and overreach Sanchez's determination to call a particular witness, a codefendant, in his defense. This right "is in plain terms the right to present a defense."[8] The judge was advising him in no uncertain terms that the testimony he sought to obtain would harm his case.[9]

Sanchez has pleaded facts and contentions establishing both his injury and the benefit to the State of the fact that Canava did not testify in his defense case.[10] The right to effective assistance of

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[7]Defendant Connally's printed words appear, in part, to be sarcastic and demeaning to Sanchez. For example, he states, just as Sanchez is being called to testify by his attorney "All *right. I'd like to make an announcement that he* [Mr. Sanchez] *wanted to go talk to his mother and that is not grounds for continuance to get another lawyer."* Vol. 5, pp. 975, 980; Appendix.

[8]Washington v. State of Texas, 388 U.S. 14, 19 (1967).

[9]Vol. 5, p. 980; Appendix.

[10]Appendix, Plaintiff s First Amended Complaint, ¶¶ 17-26, 36-51 (Vol. 3, pp. 580-600).

counsel is a clearly established right[11] and Respondent Connally was aware at the time of advising Sanchez on the impact of the Canava testimony that he was advising Sanchez on the very matter over which Sanchez wanted to discharge his attorney.[12]

Respondent Connally's advisory opinion on this matter was an unwarranted invasion of the attorney client relationship the same as if Respondent Connally had sat down in conference with Sanchez and his defense attorney to assist them in selecting the jury, determining topics of cross-examination, and any number of other decisions in which an accused is entitled to effective assistance of counsel.

Respondent Connally denied Sanchez effective assistance of counsel not by judicial act, but by trickery. It was trickery so complete[13] that it confined Sanchez for five and onehalf years until

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[11]Powell v. Alabama, 287 U.S. 45, 66-73 (1932) (6th Amendment right to counsel exists, is fundamental to fair trial, and is incorporated in Due Process clause of 14th Amendment).

[12]Vol. 5, pp. 969-986; Appendix.

[13]Both Respondent Connally and defense counsel Smith filed documents in the Court of Criminal Appeals that are at best

the State acquiesced to grant him a new trial, which resulted in a dismissal of the charges against him.

Question Presented No. 2

The opinion of the majority in Schultea v. Wood, 47 F.3d 1427 (5th Cir. 1995) has developed a two step procedure for addressing claims of official immunity under Fed. R. Civ. P. 7 that invites abuse in its application. The case for which review is sought herein illustrates the weaknesses in the current doctrine and, due to its facts, offers an important opportunity for this Court to clarify the relationship between pleading and qualified immunity.

The Schultea court announced that by requiring a plaintiff to furnish "a reply tailored to an answer pleading the defense of

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misleading and at worst fraudulent, that concealed the facts concerning Sanchez's attempt to have Canava testify at his trial; Mr. Smith's affidavit demonstrates either how completely he was misled by Defendant Connally's misstatements or that he had joined the conspiracy to conceal evidence that could set aside Sanchez's conviction. See Vol. 5, pp. 1031-1033; and Vol. 5, p. 1034.

qualified immunity" will allow the court to "ban discovery ... until it finds that plaintiff has supported his claim with sufficient precision and factual specificity to raise a genuine issue as to the illegality of defendant's conduct at the time of the alleged acts." 47 F. 3 d at 1433 (emphasis added). If limited discovery is then allowed, "at its end, the court can again determine whether the case can proceed and consider any motions for summary judgment under Rule 56." *Id.* The Schultea procedure under Rule 7 with its almost-automatic ban on discovery has become a de facto summary judgment proceeding without availability of discovery. For this reason, any public official defendant has achieved a substantial advantage over any other federal defendant because he or she can test the legal sufficiency of a plaintiff s evidence (as required in a Rule 7 reply) without disclosing any information that would corroborate or strengthen the plaintiff s knowledge of "factual specificity" to overcome official immunity. The trial court's opinion makes clear that, despite the precision and factual specificity of Petitioner's complaint and Rule 7 reply, the trial judge will construe this material, not in Petitioner's favor, but rather,

to Petitioner's detriment. In its order of dismissal, the trial court made fact findings contrary to Petitioner's claims about the relation between the proceeding and Respondent Judge Connally's comments to Petitioner, the specific role and duty of Respondent Prosecutor Stevens, and finally, what a reasonable officer in Respondent Orras's position would have concluded (while ignoring his conflicting testimony in the Canava trial). *See* Appendix. These circumstances call for the exercise of this Court's supervisory powers.

The trial court and the Fifth Circuit in its affirmance without opinion, have misused the Rule 7 reply requirement by substituting its judgment for that of the trier of fact. Petitioner's allegations, when taken as true, and construed in favor of Petitioner (as Fed. R. Civ. P. 12(b)(6) requires) and construed as to do substantial justice (as Fed. R. Civ. P. 8(f) requires), demonstrate both the facts and the law necessary to overcome the defense of official immunity. As discussed more fully below, the trial,, court has gone beyond its stated purpose of "testing the formal sufficiency of the statement of the claim for relief " Appendix, Order Granting Defendants' Motions for

Dismissal. In this respect the Schultea standard has been misapplied as to conflict with the standard of review required under Rule 12(b).

Question Presented No. 3

In considering the standard for official immunity both the trial court and the Fifth Circuit have departed from the basic inquiry for official immunity that this Court has annunciated in Stump v. Sparkman, 98 S.Ct. 1099 (1978) to determine whether an act by a judge is a judicial one: "we look to the particular act's relationship to a general function normally performed by a judge." 502 U.S. at 13.

When a doctrine is so often applied with the same result, as has been the case with judicial immunity from suit, its edges become blurred.[14] Was Respondent Connally's advice to Petitioner on the effect of testimony by Raymundo Canava, a co-defendant, "a function normally performed by a judge?" Stump v. Sparkman, 98 S. Ct. 1099,

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[14]As a class, judges have long enjoyed a comparatively sweeping form of immunity, though one not perfectly well defined. Judicial immunity apparently originated, in medieval times, as a device for discouraging collateral attacks and thereby helping to establish appellate procedures as the standard system for correcting judicial error. Forrester v. White, 484 U.S. 219, 225-26 (1988).

1107 (1978). This remains the critical test for determining whether an act is a judicial act. Id. *See also* Ex Parte Virginia, 100 U.S. 339, 348 (1879) (whether an act was judicial is determined by *its* character, not by the character of the agent).

What Respondent Connally has never been called upon to explain is how his acts in advising Petitioner Sanchez on the harmful effects of a prospective witness's testimony have anything to do with his legal rulings or any function normally performed by a judge.[15]

The Court has repeatedly held that the approach to official immunity is a "functional" one determined by the nature of the act performed and not simply, who has performed it. *See, e.g.*, Forrester v. White, 484 U.S. 219, 229 (1988). Moreover, the formality or informality of a proceeding does not determine whether an act is a judicial one. McAlester v. Brown, 469 F.2d 1280, 1282 (5th Cir.

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[15]Ex-Parte Virginia, 100 U.S. at 348. *See also* Burns v. Reed, 111 S. Ct. 1934, 1939 (1991) (official seeking absolute immunity bears burden of showing immunity justified for function in question); Forrester v. White, 484 U.S. 219, 224 (1988) (functional approach discussed).

1972). All of the judge's official duties do not automatically become judicial acts merely because they are performed by a judge. Brewer v. Blackwell, 692 F.2d 387, 39698 (5th Cir. 1982). This Court has also described absolute immunity as "strong medicine." 484 U.S. at 230. In that connection, it is worthwhile to review the policy behind official immunity. The policy is one of balance; to eliminate fear of personal liability that might interfere with the exercise of an official's discretionary duties, but on the other hand to encourage officials to carry out their duties in a lawful and appropriate manner. Id. at 223.

Finally, it must be asked: If judges were to decline to tell criminal defendants which potential witness's testimony would harm them at trial because they feared civil liability if their advice were wrong (or false as in this case), would their judicial acts be impaired or compressed? No, quite to the contrary, the protections of the Fifth and Sixth Amendments would be strengthened and discretionary judicial acts would not be influenced.

In the case at bar the harm to Petitioner Sanchez was not inflicted by judicial act; it was inflicted by false information and legal

advice given *under color of judicial authority.* But the proximity of this false information and bad legal advice to other acts that were judicial in nature does not transform non-judicial acts into judicial ones.[16] Just as the proximity of the court reporter's making of a transcript is to the trial proceeding[17], just as the function of terminating a probation officer is to the judge's decisions on probation[18], just as legal advice by a public defender is to the role of the judge in guaranteeing effective assistance of counsel under the Constitution[19], so are Connally's statements to Sanchez about Canava non-judicial acts. These are the acts that injured Sanchez in the exercise of his constitutional rights and they have no relation to any

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[16]*See, e.g.*, Mireles v. Waco, 502 U.S. 9, 13 (1991) (look to particular act's relation to a general function normally performed by a judge); Stump v. Sparkman, 435 U.S. 349, 361-62 (1978) (relevant inquiry is nature and function of act); Brewer v. Blackwell, 692 F.2d 387, 396 (5th Cir. 1982)(unprotected behavior must be separated from the shielded and judges are liable for the acts that are not judicial).

[17]Antoine v. Byer & Anderson, Inc., 508 U.S. 429 (1993).

[18]Forrester v. White, 484 U.S. 219, 229-30 (1988)

[19]Tower v. Glover, 467 U.S. 914 (1984).

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judicial duty or act of Judge Connally. The protection of this conduct under the cloak of judicial immunity serves no policy, and in fact violates the public policy that the threat of liability will encourage government officials "to carry out their duties in a lawful and appropriate manner and to pay their victims when they do not." Forrester, 484 U.S. at 223. Judges are no more deserving of immunity for false legal advice they give to criminal defendants than are public defenders entitled to judicial or prosecutorial immunity for the intentional torts they may commit against their clients.[20] Similarly, it makes no sense to immunize the unsolicited legal counsel that a judge may give a criminal defendant on what witnesses he should avoid calling to testify, and to decline to give immunity to prosecutors for the solicited legal advice they may give to police.[21]

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[20]Id., at 922-23.

[21]In Burns v. Reed, the Court observed, "The Court of Appeals speculated that anything short of absolute immunity would discourage prosecutors from performing their 'vital obligation' of giving legal advice to the police. 894 F.2d, at 956. But the qualified immunity standard is today more protective of officials than it was at the time that *Imbler* was decided. 'As the qualified immunity defense has evolved, it provides ample support to all but

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In regard to the Respondent prosecutor, Preston Stevens, the trial court and the Fifth Circuit have ignored Texas state law[22] in concluding that Stevens had no duty to correct Judge Connally's false statements to Petitioner concerning testimony in a co-defendant's trial in which Stevens had appeared as prosecutor for the State. Although Stevens represented the State when the was in Judge Connally's presence, he had no role as an advocate in the matter before Judge Connally, and he specifically stated that he did not oppose the granting of a continuance to Petitioner so that he could find a lawyer who would follow his instructions in subpoenaing his co-defendant to testify. In recognizing "absolute prosecutorial immunity" for Stevens, the Fifth Circuit has departed from the functional approach

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the plainly incompetent or those who knowingly violate the law.' *Malley, supra,* 475 U.S., at 341, 106 S.Ct., at 1096; see also *Mitchell*, 472 U.S., at 524, 105 S.Ct., at 2814. Although the absence of absolute immunity for the act of giving legal advice more carefully, "'[w]here an official could be expected to know that his conduct would violate statutory or constitutional rights, he *should* be made to hesitate.'" *Ibid.* (quoting *Harlow*, 457 U.S., at 819, 102 S.Ct., at 2738)." Burns v. Reed, 111 S.Ct. 1934, 1943-44 (1991).

[22]*See* text and accompanying notes 24-25, infra.

that this Court has required in Buckley v. Fitzsimmons, 113 S.Ct. 2606 (1993), which looks to the nature of the function performed, not identity of the actor who performed it. Respondent Stevens' decision to join Judge Connally's false statement to Petitioner is not a discretionary matter of prosecutorial advocacy. It is the functional equivalent of secreting a witness that he knows the defense is seeking as was the case in United States v. Weddell, 800 F.2d 1404, 1409 (5th cir. 1986). The Fifth Circuit has disallowed this practice and should have done so in this case.

Additionally, because Texas has imposed an affirmative duty of disclosure on public prosecutors in both statute[23] and court-adopted rules of professional conduct[24], the scope of prosecutorial discretion available for immunity should be measured against this state law standard.

Petitioner's claim against Orras and the City of Odessa is that

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[23]Tex. Code Crim. Proc. art. 2.01 (1996)

[24]Tex. R. Disciplinary P. 3.09 (1992)(similar provision formerly found in Tex. Disciplinary R. Prof. Conduct 7-103(B) (1989).

they instigated and maintained a criminal prosecution against him without probable cause and that the City authorized and ratified this misconduct through specific institutional practices and policies. See Appendix, Plaintiff's First Amended Complaint at ¶¶ 29-35, Vol. 3, pp. 580-600. Police officers are not immune from liability if they can be considered to be complaining witnesses[25], which is the case with Respondent Orras. Numerous material differences exist between Respondent Orras's testimony at the Canava trial and the Sanchez trial. Certainly distance from the transaction is the most obvious fabrication or "enhancement" in Orras's testimony between the Canava and Sanchez trials. At Canava's trial, he agreed with defense counsel's estimate that the distance was **thirty feet**. Vol. 5, p. 1077, Appendix. During the Sanchez trial, Orras was asked three separate times for his distance from Sanchez during the Sanchez-Canava exchange and he stated each time with no apparent hesitation or reflection, that it was **eight to ten feet**. Id. at pp. 1091, 1101, 1104.

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[25]White v. Frank, 855 F.2d 956, 957-58.

Orras's vision also improved during the time between the two trials. At the Canava trial when Stevens asked Orras to describe what occurred when Canava approached the Cordoba, he stated that Canava got in by the passenger door, had a brief conversation with the driver, and then Canava handed the driver an object and in return the driver handed Canava an object. Vol. 5, p. 1070. At the Sanchez trial when Stevens asked Orras if he could see any transactions that transpired between Canava Sanchez, Orras described seeing Canava take Orras's money out of his pocket and hand the money to the driver and seeing the driver hand "an item" to Canava. Vol. 5, pp. 1077-78; Appendix. This change is significant because of a third variation in the Orras story.

At the time of the Canava trial, Orras stated that Canava exited Orras's vehicle with the twenty-five dollars that Orras had given him in his hand. Vol. 5, p. 1069, Appendix. Orras apparently could not see what happened with the cash except to see that Canava did not have it in his hand when he came back to Orras's car. Vol. 5, p. 1070, Appendix. This was the difficulty that Orras encountered

when he began to change his story from the Canava trial. In his original story, when he testified that the money was still in Canava's hand as he got into the vehicle and closed the door, no one could have seen what Canava did with the money in his hand. The change in Orras's story for the Sanchez trial was an essential fabrication in order to offer evidence that Sanchez **delivered** heroin in exchange for money.[26] Finally, with regard to the claims against Orras, it is noteworthy that the police report that Orras prepared contains *nothing about anyone seeing an object change hands* in the Cordoba, according to Orras's testimony at the Canava trial.[27]

In considering the claims against Respondent Orras, the trial

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[26]From the trial records it is clear that the Cordoba was in a driveway facing North and Orras's vehicle was parked on the North curbside of the street in front of Canava's house and facing West; thus whatever Orras saw of Canava's movements would have been seen over Canava's right shoulder from a position behind him. See Vol. 5 pp. 1069, Appendix.

[27]Vol. 5, p. 1079; Appendix. The actual report has not been furnished to Petitioner. Although Petitioner has served discovery requests for these and other documents on Orras and the City, no discovery responses were due prior to signing of the order of dismissal.

court misses the issue for malicious prosecution. It gave no weight to the material variance between his testimony at the Canava trial and at Petitioner's trial. Petitioner is entitled to have the allegations of material variance taken as true and have the evidentiary benefit of this contradiction construed in his favor under Rule 12(b)(6). Petitioner has met his burden in response to the court's order under Rule 7 to plead the facts that will overcome Orras's qualified immunity claim.

Question Presented No. 4

Petitioner has pleaded facts that, if taken as true, as Rule 12(b)(6) requires, satisfy the requirement of a class-based animus for conspiracy. His pleadings supply evidence of each of the elements of conspiracy to obstruct the due course of justice[28] and to deny to Petitioner equal protection of law and equal privileges and immunities under law[29]. The trial court incorrectly applied these standards by either discounting or ignoring Petitioner's pleadings of facts to support class-based discrimination. Petitioner has also

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[28]Britt v. Suckle, 453 F.Supp. 987 (W.D. Tex. 1978).

[29]Burns-Toole v. Byrne, 11 F.3d 1270 (5th Cir. 1994).

pleaded a casual connection between the acts of Respondents and the violations of his rights. See Appendix, Plaintiff's First Amended Complaint at ¶¶ 13-23; Vol. 3, pp. 580-600. Petitioner has pleaded three criminal cases that exhibit the institutionalized practice of which he complains. Id. at ¶ 25. He has pleaded specific defects in the City's training and supervision practices that ratified the misconduct complained of. Id. at ¶ 34. See also Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit, 954 F.2d 1054, 1058 (5th Cir. 1992). Petitioner's pleading satisfies the requirement of an allegation of class-based animus for the conspiracy.[30]

Moreover, the trial court's opinion gives no consideration for Rule 12(b)(6) purposes to the post-conviction conduct of Stevens and Connally, which is directly responsible for Petitioner's illegal

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[30]See Plaintiff's First Amended Complaint at ¶¶ 49-51; Vol. 3, pp. 580-600. See Taylor v. Gilmartin, 686 F.2d 1346, 1355-56, 1358-61 (5th Cir. 1982) cert den'd 103 S.Ct. 788 (1983); Britt v. Suckle, 453 F.Supp. 987, 994-998 (E.D. Tex. 1978)(class based animus requirement applied differently under § 1985(2)).

confinement for five years and four months over the time required for his state criminal appeal, two applications for state habeas corpus, and finally his successful application for federal habeas corpus pursuant to 28 U.S.C. § 2254.

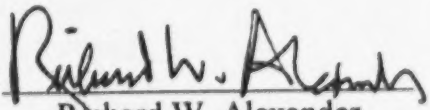
CONCLUSION

For the reasons stated, the Court should grant the foregoing Petition for Certiorari.

Date: May 12, 1997

Respectfully submitted,

RICHARD W. ALEXANDER, P.C.

By: 

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ATTORNEY FOR PETITIONER,
EUJENIO R. SANCHEZ

LIST OF APPENDICES

APPENDIX A: Decision (without opinion), No. 96-50072 in the United States Court of Appeals for the Fifth Circuit

APPENDIX B: Order Granting Defendants' Motions for Dismissal, Sanchez v. Ector County, Texas, et al., MO-95-CA-039, In the United States District Court for the Western District of Texas, Midland-Odessa Division (Dec. 20, 1995).

APPENDIX C: Order (transferring action to United States Magistrate Judge for complete adjudication)MO-95-CA-039, Sanchez v. Ector County, et al., In the United States District Court for the Western District of Texas, Midland-Odessa Division (Sept. 6, 1995).

APPENDIX D: Plaintiff's First Amended Complaint, filed July 20, 1995.

APPENDIX E: Plaintiff's Brief on Immunity and List of Appendices, filed October 20, 1995

APPENDIX F: Affidavit of Eugene Rios Sanchez (attached as Appendix O to Post-Conviction Application for Writ of Habeas Corpus and Federal Petition for Writ of Habeas Corpus.)

APPENDIX G: Affidavit of Reymundo Canava (attached as Appendix OO to Post-Conviction Application for Writ of Habeas Corpus and Federal Petition for Writ of Habeas Corpus.)

EXCERPTS FROM OFFICIAL COURT TRANSCRIPTS LODGED WITH THE CLERK OF THE COURT

1. State v. Sanchez, No. C-18,541, Transcript of Hearing on Motion to Substitute Counsel

2. State v. Sanchez, No. C-18,541, Transcript of Hearing on Motion for New Trial

3. Testimony of Reymundo Ybarra Canava, State v. Canava, No. C-18,564, Record on Appeal, Volume III of IV Volumes, Trial on the Merits, pages 55-56

4. Post Conviction Application for Writ of Habeas Corpus, Ex Parte Sanchez, pages 16-18, and attachments:

   Appendix J (testimony of Louis Orras in State v. Canava, No. C-18,564, pages 5-21).

   Appendix P (testimony of Louis Orras in State v. Sanchez, No. C-18,541, pages 11-30)

NO. _____

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1996

EUJENIO R. SANCHEZ
Petitioner

v.

ECTOR COUNTY, TEXAS, CITY OF ODESSA, TEXAS, LOUIS ORRAS, JOE CONNALLY, JOHN SMITH IN HIS OFFICIAL CAPACITY, PRESTON STEVENS, 244TH JUDICIAL DISTRICT COURT OF THE STATE OF TEXAS, OFFICE OF THE DISTRICT ATTORNEY FOR ECTOR COUNTY, TEXAS
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

May 12, 1997

Richard W. Alexander
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ATTORNEY FOR PETITIONER

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 96-50072

EUJENIO R. SANCHEZ,

Plaintiff-Appellant,

versus

ECTOR COUNTY, TEXAS, ET AL,

Defendants,

ECTOR COUNTY, TEXAS;
CITY OF ODESSA, TEXAS;
LOUIS ORRAS, Detective;
JOE CONNALLY, Judge, District Judge
for the 244th Judicial District
in Ector County, Texas;
JOHN SMITH, Attorney at Law;
PRESTON STEVENS, Assistant District Attorney
for Ector County, Texas;
244TH JUDICIAL DISTRICT COURT,
ECTOR COUNTY, TEXAS; DISTRICT ATTORNEY'S OFFICE,

Defendants-Appellees.

Appeal from the United States District Court
For the Western District of Texas, Midland
(MO-95-CV-39)

Before HIGGINBOTHAM, DAVIS, and BARKSDALE, Circuit Judges.

PER CURIAM:

AFFIRMED. See Local Rule 47.6.

Pursuant to Local Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

EUJENIO R. SANCHEZ	§	
	§	
	§	
V.	§	
	§	
ECTOR COUNTY, TEXAS;	§	
CITY OF ODESSA,	§	
TEXAS; LOUIS ORRAS;	§	MO-95-CA-039
JOE CONNALLY, in his	§	
official capacity;	§	
PRESTON STEVENS;	§	
244th JUDICIAL	§	
DISTRICT COURT OF THE	§	
STATE OF TEXAS;	§	
OFFICE OF THE DISTRICT	§	
ATTORNEY FOR ECTOR	§	
COUNTY.	§	

ORDER GRANTING DEFENDANTS'
MOTIONS FOR DISMISSAL

BEFORE THE COURT are the Motions of Defendants Joe Connally, The City of Odessa, Louis Orras, Preston Stevens, John Smith-, The Office of the District Attorney for Ector County, and Ector County, Texas to Dismiss for Failure to State a Claim pursuant to 12(b)(6), FED.R.CIV.PROC. or for Summary

Judgment pursuant to Rule 56, FED.R.CIV.PROC. Because the Court considered nothing outside of the pleadings in analyzing Plaintiff s claims, each motion is treated as a motion to dismiss pursuant to Rule 12(b)(6). After careful consideration of Plaintiff's claims and the Defendants' motions, it is the opinion of the Court that the Motions should be GRANTED and this cause dismissed in its entirety.

FACTS AND PROCEDURAL HISTORY

Eujenio Sanchez (Sanchez) and Reymundo Ybarra Canava (Canava) were implicated in a drug deal by Louis Orras (Orras), an undercover police officer for the City of Odessa, Texas. Sanchez and Canava were indicted, arrested and received separate trials with Canava's trial occurring first.

The testimony at Canava's trial was that Orras went to Canava's residence to buy heroin. Canava stated that he "didn't have any" and went back inside his house, When he reemerged, Canava stated that "he was on his way," which Orras considered to

mean that Canava's supplier was on his way with heroin. Orras then gave Canava twenty-five dollars and they waited in Orras' undercover police car for the supplier to show up. When Eujenio Sanchez drove up in his yellow Chrysler Cordoba, Canava stated there he is." Canava then got out of the undercover police car with the twenty-five dollars and approached the yellow Cordoba, which was about feet away. Canava got into the Cordoba and had a brief conversation with Sanchez. Canava handed Sanchez something and was handed something in return by Sanchez. When Canava returned to Orras' car, he had a paper of heroin in his hand, which he gave to Orras. Neither Canava nor Sanchez testified at Canava's trial. Canava was found guilty and sentenced to fifty years imprisonment for delivery of a controlled substance.

Sanchez was originally represented by R. Sandy Torres in the criminal proceedings against him. Torres made a motion to withdraw as counsel for Sanchez, and the motion was granted by the Honorable Joe Connally, Judge in the 244th Judicial District of

Texas. Sanchez's new counsel, John W. Smith, obtained two continuances of the trial, which was eventually set for February 4, 1988. Sanchez became dissatisfied with Smith's representation, and indicated to the court that he wished to substitute counsel. At a hearing on the matter, Sanchez testified that he was dissatisfied with Smith because Sanchez w ' anted to have Canava testify at his trial, while Smith felt that Canava's testimony would be harmful. This exchange took place:

Court: In the interest of the legal profession and particularly the District Attorney's office and the defense counsel, I am going to take judicial notice of the contents of the file in Cause no., styled the State of Texas vs. Reymundo Canava and of the Statement of Facts in that case which has been prepared, that case is on appeal, because I feel, I just feel that you, Mr. Sanchez, that Mr. Canava testified in that trial and that his testimony did nothing but harm you.

Sanchez: Yes, sir.

Court: And he can't come in here and change his testimony without getting some more time for perjury. You can just tell, although a copy of the record can be made available to

> you, I guess, I don't know where all the copies are, but you can take my work for it that Mr. Canava's testimony does not help you but in fact hurts your case.

Connally then stated that if Sanchez would say under oath that he was able to hire another lawyer and was willing to stay in the Ector County Jail until the lawyer could familiarize him/herself with the case and schedule it for trial, that he would then grant Smith's motion to withdraw as Sanchez's counsel. Sanchez refused this offer, and the case proceeded to trial.

At Sanchez's trial, Orras' testimony was the same as it had been in Canava's trial leading up to the time when Sanchez arrived in the yellow Cordoba. On direct examination by Ector County Assistant District Attorney Preston Stevens, Orras testified that when Canava had left Orras' car and was getting in to Sanchez's car, "I could see that he (Canava) had taken the money out of the (shirt) pocket and handed it to the driver who was the only other person in the car and after the driver got the money, I seen him hand an item to Mumbo (Canava). " Orras testified that he could

not see what the item was that the driver had handed Canava, but that Canava handed the same item to Orras. Neither Canava nor Sanchez testified at the trial. Sanchez was found guilty of delivery of a controlled substance and the punishment, enhanced by proof of one prior felony conviction, was assessed at confinement for life in the Texas Department of Corrections.

Sanchez filed a motion for new trial, which was denied. He then filed a state application for writ of habeas corpus contending that he had received ineffective assistance of counsel. As part of the fact-finding process, the state court ordered John Smith to file an affidavit responding to the allegations. Smith's affidavit states in part:

> That Reymundo Conava (sic) had previously testified in his own trial, that the controlled substance, the subject. of the criminal case belonged to Eugene (sic) Rios Sanchez. Based on that information it would have been, at the very least, stupidity on my part to put Reymundo Conava (sic) on the stand. This was explained to Eugene (sic) Rios Sanchez and at the time he seemed to understand.

The Court of Appeals for the Eighth District of Texas denied the

application without written order upon the recommendation of the trial court.

Sanchez then filed a federal application for writ of habeas corpus pursuant to 28 U.S.C. § 2254 making the same contentions of ineffective assistance of counsel. This Court granted the writ after reviewing the limited extent of Canava's testimony at his trial, ordering Sanchez's conditional release from custody.[1] The State

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[1]The entirety of Canava's testimony is as follows:

Q: Mr. Canava, you are Reymundo Canava?
A: Yes, ma'am.
Q: And we have had some discussion during lunch and prior to lunch about whether or not you would testify in this cause?
A: Yes, ma'am.
Q: And you understand what you have been charged with?
A: Yes, ma'am.
Q: And you have been present for the testimony this morning?
A: Yes, ma'am.
Q: Okay. We have discussed and you have told me it is your desire not to testify in this case?
A: Yes, ma'am.
Q: And you understand you have the right not to testify in this case?
A: Yes, ma'am.
Q: And your reason for not testifying is based on what we have discussed about impeachment and cross examination by the prosecutor?

chose to dismiss the case against Sanchez on May 10, 1994 rather than retry him.

This lawsuit has been filed under Title 42 U.S.C. § 1983 alleging the violation of Sanchez's civil rights by those involved in his state criminal proceedings. Specifically, Sanchez alleges that Defendant Orras made a false report and gave false testimony for the purpose of incriminating Sanchez; the City of Odessa had in place a policy which tolerated the giving of false reports and false testimony; Ector County Assistant District Attorney Stevens instigated a prosecution against Sanchez that was unsupported by probable cause and had knowledge that Judge Connally's statements were incorrect and did not attempt to correct them; The Honorable Joe Connally acted outside of his judicial role in making certain statements, the result of which was to deny Sanchez of

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A: Yes, ma'am.
Defense attorney: That is all I have.
Prosecutor: I have nothing of this witness.
Court: All right, sir, you may rejoin your lawyer.

effective assistance of counsel and right to a fair trial; the District Attorney for Ector County failed to properly train and super-vise his assistants, each of the Defendants named above conspired against Sanchez in violation of 42 U.S.C. § 1985 (2) and (3); and the civil forfeiture proceeding against Sanchez's automobile violated the Double Jeopardy Clause of the Fifth Amendment. Sanchez also claims several violations of Texas state law.

Each of the Defendants has asserted that he is entitled to either absolute or qualified immunity. Judge Connally, Ector County, Texas, the Office of the District Attorney of Ector County, Preston Stevens, and Louis Orras filed motions for a Rule 7 Reply pursuant to *Schultea v. Wood*, 47 F.3d 1427 (5th Cir. 1995). The Plaintiff filed a comprehensive brief on official immunity on October 20, 1995 which responds to the immunity claim of each Defendant.

DISCUSSION

The Standard of Review Pursuant to Rule 12(b)(6)

When passing on a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, the Court must "accept all material allegations of the complaint as true and construe them in the light most favorable to the nonmoving party. *" Garret v. Commonwealth Mortgage Corp. of Am.*, 938 F.2d 591, 593 (5th Cir. 1993). A Rule 12(b)(6) motion allows for "no discretion in the usual sense." *Mitchell v. EZ Way Trailers, Inc.*, 269 F.2d 126, 130 (5th Cir. 1959).

The purpose of a motion under Rule 12(b)(6) is to test the formal sufficiency of the statement of the claim for relief. The complaint need not set forth specific facts to support its general allegations. *Conley v. Gibson,* 355 U.S. 41, 47, 78 S.Ct. 99, 103 (1957). However, when the plaintiff is suing a public official under 42 U.S.C. § 1983, the Fifth Circuit "insist[s] that complaints plead more than conclusions, and a plaintiff can, at the pleading stage, be required to engage the affirmative defense of qualified immunity when invoked." *Schultea,* 47 F.3d at 1430. The court

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employed the tool of a Reply under FED.R.CIV.PROC... Rule 7 for this purpose. Thus, in testing the sufficiency of the statement of the claim for relief, the Court shall consider that the pleadings have been expanded by those filed under Rule 7. The affidavits and state court records referred to in this Order have been attached as exhibits to the Rule 7 Reply and are therefore technically part of the pleadings under *Schultea*.

The Motion to Dismiss of Defendant Joe Connally

Defendant Joe Connally, individually and in his official capacity as judge for the 244th Judicial District of Texas, requests dismissal on the basis of absolute judicial immunity. Plaintiff contends that Judge Connally is not entitled to judicial immunity because his act of expressing an opinion as to the helpfulness of Canava's testimony was clearly outside of Judge Connally's jurisdiction and not a normal judicial function.

"Few doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts

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committed within their judicial jurisdiction, as this Court recognized when it adopted the doctrine, in *Bradley v. Fischer*, 13 Wall. 335, 20 L.Ed. 646 (1872)." *McAlester v. Brown*, 469 F.2d 1280, 1282 (5th Cir. 1972). "A judge will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority; rather, he will be subject to liability only when he has acted in the 'clear absence of all jurisdiction.'" *Stump v. Sparkman, 43* 5 U.S. 349, 356, 98 S.Ct. 1099, 1105 (1978). As a Texas District Court Judge for the 244th Judicial District, Defendant Connally had "original jurisdiction in criminal cases of the grade of felony, of all misdemeanors involving official misconduct, and of misdemeanor cases transferred to the district court Tex.Crim.Proc.Code § 4.05 (1987). The claims against Judge Connally are based upon his actions during a proceeding on Sanchez's indictment for a felony offense, delivery of a $25 paper of heroin. Where a court has some subject-matter jurisdiction, there is sufficient jurisdiction for immunity

purposes. *Malina v. Gonzales, 994* F.2d 1121, 1125 (5th Cir. 1993). Thus, Judge Connally did not act in the "clear absence of all jurisdiction."

Furthermore, weighing the four factors generally relied upon in this circuit to determine whether an act is "judicial" also supports the conclusion that Judge Connally is entitled to absolute immunity. The factors are as follows:

(1) whether the precise act complained of is a normal judicial function;

(2) whether the acts occurred in the courtroom or appropriate adjunct spaces such as the judge's chambers;

(3) whether the controversy centered around a case pending before the court; and

(4) whether the acts arose directly out of a visit to the judge in his official capacity.

McAlester at 1282. These factors "relate to the nature of the act

itself, i.e., whether it is a function normally performed by a judge, and to the expectations of the parties, i.e., whether they dealt with the judge in his judicial capacity. 11 *Stump*, 98 S. Ct. at 1 107. Courts broadly construe these factors in favor of immunity, even if not all of them apply to the particular case. *Id.*

> The relevant inquiry regarding the first factor - whether the precise act complained of is a normal judicial function - is to examine the "nature and function" of the act, not the act itself. *Mireles v. Waco,* 502 U.S. 9, 12, 112 S.Ct. 286, 288, 116 L.Ed.2d 9 (1991). The Court is to look to the particular act's relation to a general function normally performed by a judge. Id.

Malina v. Gonzales, 994 F.2d 1121, 1124 (5th Cir. 1993).

The Supreme Court, in *Mireles v. Waco, supra,* held that a judge was judicially immune from suit for ordering police officers to bring an attorney before the judge, even though the judge allegedly directed officers to carry out that order with excessive force, because a judge is not deprived of immunity because the action he took was in error or was in excess of his authority. The Supreme Court noted that a judge's direction to police officers to

carry out a judicial order with excessive force is not a function normally performed by a judge. But if particular acts are scrutinized in isolation, then any mistake by a judge in excess of his authority would become a "nonjudicial" act. *Id.*, 502 U.S. at 11-12, 112 S.Ct. at 288.

In the context of this case, the judge's offering of legal advice or, in Plaintiff's terms, an "advisory opinion" to a criminal defendant is not a function normally carried out by a judge. However, the continents were made during what was unquestionably a judicial function of considering Plaintiff s request for a continuance of his criminal trial while he located a more suitable attorney. Thus, under the *Mireles* analysis, Connally retained his judicial immunity even in the face of the comments about the helpfulness of Canava's testimony. The remaining three *McAlester* factors clearly apply in this case: the acts occurred in the courtroom; the controversy centered around a case pending before the court; and the acts arose directly out of a visit to -the judge in

his official capacity. Thus, Judge Connally is entitled to absolute judicial immunity in regard to all of Plaintiff s claims against him, including the conspiracy claim,[2] and his motion to dismiss should be granted.

The Motion to Dismiss of Defendant Preston Stevens

Stevens contends that, as a prosecutor for the Ector County District Attorney's office, he is entitled to absolute prosecutorial immunity. The Plaintiff claims that Stevens is not entitled to absolute immunity because Stevens was not acting within his role as an "advocate" for the State because he failed to correct Judge Connally's statements regarding Canava's testimony.

"Prosecutors are absolutely immune under § 1983 for their conduct in 'initiating a prosecution and in presenting the State's case,' because that conduct is 'intimately associated with the judicial phase of the criminal process.'" *Brummett v. Campbell,* 946 F. 2d 1 178, 1181 (5th Cir. *1991)(reh'g denied)(quoting Imbler*

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[2]*Freeze v. Griffith,* 849 F.2d 172, 174 (5th Cir. 1988).

v. Patchman, 424 U.S. 409, 430-31, 96 S.Ct. 984, 995, 47 L.Ed.2d :28 (1976)). Absolute immunity shelters prosecutors even when they act maliciously, wantonly, or negligently. *Rykers v. Alford,* 832 F.2d 895 (5th Cir. 1987). Furthermore, "[A] conspiracy between the judge and prosecutor to predetermine the outcome of a judicial proceeding, while clearly improper, nevertheless does not pierce the immunity extended to judges and prosecutors." *Ashelman v. Pope,* 793 F.2d 1072 (9th Cir. 1986)(en banc). Plaintiff's contention that Stevens was not acting as an advocate for the State merely because he failed to correct Judge Connally's statements about Canava's testimony is without merit. Stevens appeared as a lawyer for the State of Texas in Sanchez's criminal proceedings and "it is to the function that we defer." *Brummett* at 1182. Stevens is entitled to absolute prosecutorial immunity in regard to all of Plaintiff's claims against him, including the conspiracy claim, and his motion to dismiss should be granted.

The Motion to Dismiss of Defendant Louis Orras

Sanchez's allegations against Orras are that he made a false report to prosecutors for the purpose of incriminating Sanchez and gave false testimony at Sanchez's trial, which differed materially from the testimony he gave at Canava's trial.

A witness is entitled to absolute immunity from § 1983 damage claims, even if it is alleged that the witness committed perjury. *Graves v. Hampton, I* F.3d 315, 318 (5th Cir. 1993). This immunity is applied to the trial testimony of all witnesses, even government officials who testify about the performance of their official duties. *Briscoe v. LaHue, 460* U.S. 325, 326, 103 S.Ct. 1108, 1111, 75 L.Ed.2d 96 (1983). Sanchez's claim based on the differences in Orras' testimony in Canava's and Sanchez's trials therefore must fail on absolute immunity grounds.

However, in the context of a § 1983 claim for malicious prosecution, the action is for the malicious complaint, indictment, or action, and not for the testimony of the witness. *Mite v. Frank,*

855 F.2d 956, 960 (2nd Cir. 1988). After *Albright v. Oliver*, _ U.S. 114 S.Ct. 807, 127 L.Ed.2d 114 (1994) was decided, the Fifth Circuit stated:

> The Supreme Court has recently held that malicious criminal prosecution, if actionable in constitutional law, should be governed by the Fourth Amendment rather than substantive due process, with its "scarce and open-ended" "guideposts."

Johnson v. Louisiana Dept. of Agriculture, 18 F. 3d 318, 320 (5th Cir. 1994). Sanchez's § 1983 claim against Orras for malicious prosecution is therefore properly considered under the Fourth Amendment's "reasonableness" standard. *Blackwell v. Barton*, 34 F.3d 298 (5th Cir. 1994).[3]

Orras is entitled to qualified immunity unless he violated a

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[3]The Fifth Circuit held in *Eugene v. Alief Indep. Sch. Dist.*, *65* F.3d 1299, 1303 (5th Cir. 1995) that a plaintiff who had couched her Section 1983 malicious prosecution claims in terms of the Fourteenth Amendment failed to state a claim. Sanchez appears to have based his malicious prosecution claim on the Fourteenth Amendment, as there is no mention of the Fourth Amendment in his Amended Complaint. However, the Court will apply the Fourth Amendment standard rather than require Sanchez to replead.

constitutional right that was clearly established at the time of his conduct. *Pfannstiel v. Marion*, 918 F.2d 1178, 1183 (5th Cir. 1990). Sanchez has asserted a clearly established constitutional right: to not be arrested absent probable cause. Orras' claim to qualified immunity in regard to this claim must be weighed in light of this Fourth Amendment right. *Malley v. Briggs*, 475 U.S. 335, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986). "If reasonable public officials could differ on the lawfulness of the defendant's actions, the defendant is entitled to qualified immunity. " *Id.* Therefore, even if Orras violated Sanchez's constitutional rights, he is entitled to qualified immunity if his conduct was objectively reasonable. *Id.*

Sanchez has asserted that Orras violated his Fourth Amendment right to be free from an unreasonable arrest by giving false information to the District Attorney's office, which then used the information to initiate a baseless prosecution against Sanchez. Specifically, Sanchez claims that "Orras lacked probable cause in

asserting that Plaintiff was distributing a controlled substance to Canava because neither Orras nor the other officers saw Sanchez sell anything to Canava. No heroin was ever viewed in Plaintiff's possession or seized from his vehicle. " Plaintiff's Brief On Official Immunity, pg. 45.

Orras' testimony at Sanchez's trial about the transaction was that after Orras gave Canava $25, Canava put the money in his pocket and got into Sanchez's car. Then, "[h]e took the money from his pocket and handed it to [Sanchez] and [Sanchez] upon receiving the money handed him and item and [Canava] took it in his hand and exited his vehicle and handed it to me through my open window." Plaintiff's Brief On Official Immunity, Ex. "P"., Tr. Vol. 5, 13-18.

The relevant question in this case is the objective (albeit fact-specific) question whether a reasonable officer could have believed that Orras had witnessed an exchange of money for heroin between Sanchez and Canava, and that therefore Orras' statements

to that effect to prosecutors was lawful, in light of clearly established law and the information Orras possessed. *Anderson v. Creighton,* 483 U.S. 635, 641, 107 S.Ct. 3034, 3040, 97 L.Ed.2d 523 (1987). "[T]he court should ask whether the agents acted reasonably under settled law in the circumstances, not whether another reasonable, or more reasonable, interpretation of the events can be constructed...." *Hunter v. Bryant,* 502 U.S. 224, _, 112 S.Ct. 534, 537, 116 L.Ed.2d 589 (1991).

The information Orras possessed at the time of the exchange was: 1) Orras had asked Canava for heroin and had given Canava twenty-five dollars for its purchase; 2) Canava indicated that he did not have any heroin, but stated that "he was on his way"; 3) when Sanchez drove up, Canava stated: "there he is"; 4) when he came back from Sanchez's car, Canava had twenty-five dollars worth of heroin, which he gave to Orras. Under these circumstances, a reasonable officer in Orras' position could have believed there was probable cause to believe that Sanchez had been

a party to the distribution of heroin. Because his statements to prosecutors about what he believed he had witnessed were objectively reasonable under *Anderson v. Creighton,* Orras is entitled to judgment as a matter of law on his plea of qualified immunity.

The Motions to Dismiss of Defendants City of Odessa, Texas and Ector County, Texas

Sanchez has included in this lawsuit John Smith, in his official capacity as the District Attorney for Ector County, and the Ector County District Attorney's Office, in addition to Ector County. However, the Ector County District Attorney's Office does not have a legal identity outside that of Ector County itself and is not a proper party defendant. Further, a suit against Smith in his official capacity is, in effect, a suit against Ector County. *Kentucky v.Graham*, 473 U.S. 159, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985).

Sanchez's allegations against Ector County are that the actions of the District Attorneys' Office in failing to prevent a

deprivation of Sanchez's civil rights and in failing or refusing to investigate, monitor or review the conduct of Plaintiff s case until the federal court granted a writ of habeas corpus reflect a policy of adequately training and supervising Assistant District Attorneys, and that this county policy caused the District Attorney's Office to violate Sanchez's civil rights.

Sanchez's allegations against the City of Odessa are that it "tolerated as an institutionalized practice, malicious prosecution, the use of perjury, misinformation and official misconduct to deprive Plaintiff of his constitutional rights in regards to criminal cause numbers C-18,564, C-18,565, (Canava), C-18,541 (Sanchez), and in other arrests and prosecutions presently unknown to Plaintiff but within knowledge of said Defendant, by establishing a pattern, practice or custom of police officers distorting facts and proffered testimony in order to secure improper convictions as evidenced by Orras' contradictory statements and untruthful testimony between Canava's and Plaintiff's trial."

A municipality may be held liable under § 1983 for a deprivation of rights protected by the Constitution or federal law only if that deprivation is inflicted pursuant to an official, municipal policy. Such a policy may include "a persistent, widespread practice of city officials or employees, which, although not authorized by officially adopted and promulgated policy, is so common and well settled as to constitute a custom that fairly represents municipal policy." *Campbell v. (City of San Antonio,* 43 F.3d 973, 977 (5th Cir. 1995), citing *Webster v. City of Houston,* 735 F.2d 838, 841 (5th Cir. 1984). The policy of custom must be "the moving force of the constitutional violation." *Monell v. New York City Dept. of Social Services,* 436 U.S. 658, 694, 98 S.Ct. 2018, 2037, 56 L.Ed.2d 611 (1978). The claims against the City and County rest on Sanchez's allegations that the City and County failed to correct the "perjurious" statements and testimony of the police officer, and failed to prevent the prosecution which Sanchez alleges was wrongful.

Sanchez has not asserted any facts, however, indicating that his alleged deprivation of constitutionally protected rights was the result of an official policy or custom. *Campbell at* 977. Instead, Sanchez's allegations describe one single incident in which a police officer offered "perjured" testimony and the district attorney's office failed to correct a "wrongful" prosecution. "'Isolated violations are not the persistent, often repeated, constant violations that constitute custom and policy' as required for municipal section 1983 liability."

Campbell at 977, citing *Bennett v. City of Slidell,* 728 F.2d 762, 768 n.3 (5th Cir. 1984)(en banc), *cert. denied,* 472 U.S. 1016, 105 S.Ct. 3476, 87 L.Ed.2d 612 (1985).

Sanchez's complaint contains the same type of generalized statements about policy inferred from a single incident which the Fifth Circuit found insufficient to survive a motion to dismiss in the *Campbell* case. Thus, Sanchez has failed to state a claim against Ector County or the City of Odessa, and the Motions to

Dismiss of the Ector County Defendants and the City of Odessa should be granted.

Double Jeopardy Claim

Sanchez alleges that the February 11, 1987 civil forfeiture of his 1978 Chrysler automobile, valued at $1,200.00, constitutes a second punishment for the same crime he was criminally prosecuted for in violation of the Fifth Amendment's prohibition against double jeopardy. Whether this claim states a cause of action under § 1983 is not clear. The protection embodied in the Double Jeopardy Clause is a personal defense which can be waived under certain circumstances. *See, e.g., U.S. v. Carrillo-Figueroa,* 34 F.3d 33 (lst Cir. 1994). If there is a § 1983 cause of action for violation of the Double Jeopardy Clause of the Fifth Amendment, it is pursuant to the Fourteenth Amendment. *See, e.g., Swisher v. Brady,* 438 U.S. 204, 98 S.Ct. 2699, 57 L.Ed.2d 705 (1978) and *Jackson v. Reese, 608* F.2d 159 (5th Cir. 1979). The threshold question therefore is whether Sanchez has been deprived of a

cognizable liberty or property interest. *Jackson v. Reese* at 160.

The Double Jeopardy Clause prohibits more than one "punishment" for the same offense. Sanchez's criminal conviction and sentence at issue here, of course, subjected Sanchez to punishment. Thus, if the prior civil forfeiture proceeding, which was predicated on the same drug offense as charged in the indictment, constituted a "punishment," the Double Jeopardy Clause will bar the criminal conviction and sentence. "Regardless of the order of the civil and criminal proceedings, the Double Jeopardy Clause will bar the second sanction if both the first and second sanctions are deemed punishment." *U.S. v. Tilley, 18* F.3d 295, 297-98, n.5 (5th Cir.), *cert. denied,* U. S. -, 115 S.Ct. 574, 13(L.Ed.2d 490

(1994). According to Sanchez's Amended Complaint, his automobile was seized on February 11, 1987 pursuant to a civil forfeiture action. Sanchez was tried and convicted on February 4, 1988. Thus, if the forfeiture of the automobile was "punishment,"

the Double Jeopardy Clause barred the imposition of Sanchez's conviction and sentence. Sanchez's conviction and sentence has already been set aside. Therefore, if there was a double jeopardy violation, Sanchez has already received the benefit of the remedy.

Furthermore, the Fifth Circuit has held that the forfeiture of drug proceeds does not constitute punishment, and thus double jeopardy analysis is not applicable. Id. at 300. It is the opinion of the Court that the forfeiture of his automobile was not double jeopardy because at the time Sanchez was arrested for a drug offense, the automobile could reasonably be considered to be drug proceeds. Because Sanchez was not deprived of a constitutionally protected interest, this allegation fails to state a claim and should be dismissed.

42 U.S.C. § 1985 Claims

Sanchez alleges a conspiracy between Orras, Stevens, and Connally to convict him of a crime he did not commit in violation of 42 U.S.C. § 1985(2) and (3). The Supreme Court has drawn a

distinction between the portions of § 1985(2) and (3) which apply to state rather than federal interests:

> The second part of § 1985(2) applies to conspiracies to obstruct the course of justice in state courts, and the first part of § 1985(3) provides a cause of action against two or more persons who "conspire or go in disguise on the highway or on the premises of another." Each of these portions of the statute contains language requiring that the conspirators' actions be motivated by an intent to deprive their victims of the equal protection of the laws.

Kush v. Rutledge, 460 U.S. 725, 103 S.Ct. 1483, 1487, 75 L.Ed.2d 413 (1983). Thus, to state a claim of interference with the course of justice in state court under 42 U.S.C. § 1985(2) and (3), a plaintiff must allege: (1) a conspiracy involving two or more persons; (2) for the purpose of depriving, directly or indirectly, a person or class of persons of the equal protection of the laws or equal privileges and immunities under the laws; and (3) an act in furtherance of the conspiracy; (4) which causes injury to a person or property, or a deprivation of any right or privilege of a citizen of the United States. In so doing, the plaintiff must show that the conspiracy was motivated by a class-based animus. *Hilliard v.*

Ferguson, et al., 30 F.3d 649, 652-53 (5th Cir. 1994).

Sanchez alleges that Judge Connally, Louis Orras and Preston Stevens conspired together to convict him of a crime he did not commit, and that they were motivated by a racial animus against Hispanic people. Specifically, Sanchez claims that Stevens had actual knowledge that the facts Orras proffered to him as his trial testimony in Plaintiff's prosecution were different from his testimony in Canava's trial, but proceeded with Sanchez's prosecution anyway. Furthermore, Stevens had actual knowledge that Canava had not testified on the merits at his trial, but remained silent when Judge Connally misstated the Canava trial record to Sanchez.

Although Sanchez provides six pages recounting the events which he claims show Connally, Orras and Stevens were involved in a conspiracy in his Reply, he has wholly failed to provide facts which would show class-based discrimination. There is simply nothing in Plaintiff's Amended Complaint or Reply which supports

the proposition that the Defendants discriminated against Hispanics as a class. *See Burns-Toole v. Byrne,* 11 F. 3d 1270, 1276 (5th Cir. 1994). Thus, Sanchez has failed to establish a cause of action under 42 U.S.C. § 1985(2) or (3).

State Law Claims

In addition to his § 1983 and § 1985 claims, Sanchez has brought a number of strictly state-law claims, including a claim under the Texas Tort Claims Act, Actual Fraud, Fraud by Silence, and Intentional Infliction of Emotional Distress.

Federal court jurisdiction over pendent state-law claims is governed by 28 U.S. C. § 1367, which provides that:

> in any civil action in which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.

28 U.S.C. § 1367(a). Under § 1367(c)(3), "the district court may decline to exercise supplemental jurisdiction over a claim under subsection (a) if -- ... (3) the district court has dismissed all claims

over which it has original jurisdiction." *See also Parker & Parsley Petroleum Co. v. Dresser Industries,* 972 F.2d 580 (5th Cir. 1992). Therefore, pursuant to 1367(c)(3), and having dismissed all claims over which it has original jurisdiction, the Court declines to consider Plaintiff's pendent, or supplemental, state-law claims. Accordingly,

IT IS ORDERED the Motions of Defendants Joe Connally, The City of Odessa, Louis Orras, Preston Stevens, John Smith, The Office of the District Attorney for Ector County, and Ector County, Texas to Dismiss for Failure to State a Claim pursuant to 12(b)(6), FED.R.CIV.PROC.., are **GRANTED**. This cause is hereby dismissed in its entirety and shall be removed from the Court's docket.

SO ORDERED AND ADJUDGED this the 20th day of December 1995.

/S/
HONORABLE LOUIS GUIROLA, JR.
UNITED STATES MAGISTRATE JUDGE

APPENDIX C

THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

SANCHEZ	)	
	)	
v.	)	MO.95-CA-039
	)	
ECTOR COUNTY, TEXAS	)	

ORDER

BEFORE THE COURT are the required forms consenting to trial by Magistrate by all parties involved in this cause of action. After due consideration, this Court transfer this cause of action for complete adjudication pursuant to 28 U.S.C. § 636 to the Honorable Louis Guirola, Jr., United States Magistrate Judge. Although there was a prior complaint naming additional defendants in this cause, the subsequent amended complaint supplants and relates back to the date of the original complaint, thereby fulfilling all requirements of Section 636. See Fed. R. Civ. P. 15(c). Accordingly,

IT IS ORDERED this cause of action is hereby

TRANSFERRED to the docket of the Honorable Louis Guirola, Jr. for complete adjudication pursuant to 28 U.S.C. § 636.

SIGNED this 6th day of September, 1995.

/S/

HONORABLE LUCIUS D. BUNTON III
SENIOR U.S. DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

EUJENIO R. SANCHEZ,	§	
	§	
PLAINTIFF	§	
V.	§	Civil Action No.MO95CA039
	§	
ECTOR COUNTY, TEXAS;	§	
CITY OF ODESSA, TEXAS;	§	
LOUIS ORRAS;	§	
JOE CONNALLY;	§	
JOHN SMITH, IN HIS OFFICIAL	§	
CAPACITY;	§	
PRESTON STEVENS;	§	
244TH JUDICIAL DISTRICT	§	
COURT	§	
OF THE STATE OF TEXAS;	§	A JURY IS HEREBY DEMANDED
OFFICE OF THE DISTRICT	§	
ATTORNEY FOR	§	
ECTOR COUNTY,	§	
	§	
DEFENDANTS	§	

PLAINTIFF'S FIRST AMENDED COMPLAINT

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES Eugenio R. Sanchez, Plaintiff, in the above referenced action and files his First Amended Complaint, leave to do so having previously been granted on July 6,1995, against Ector

County, Texas; City of Odessa; Louis Orras; Preston Stevens; Joe Connally; John Smith, in his official capacity as District Attorney for Ector County; 244th Judicial District Court of the State of Texas; and Office of the District Attorney for Ector County, and in support thereof would show the Court as follows:

I. JURISDICTION

1. This action is brought pursuant to 42 U.S.C. §§ 1983, 1985(2), (3), and 1988 and the fifth, sixth, and fourteenth amendments to the Constitution of the United States.

2. The jurisdiction of this Court is predicated on 28 U.S.C. §§ 1343(3) and (4) and 1331.

II. PARTIES

3. Plaintiff is a resident of Odessa, Texas, and at all times relevant to the allegations of this complaint was a resident of Ector County and a citizen of the United States.

4. Defendant, City of Odessa, is a municipal corporation within the State of Texas.

5. Defendant, Ector County, Texas, is a political

subdivision of the State of Texas.

6. Defendant, 244th Judicial District Court of the State of Texas, is a court of the State of Texas.

7. Defendant, Office of the District Attorney of Ector County, is an office within the State of Texas.

8. At all times relevant hereto, Defendant Louis Orras was a police officer employed by the City of Odessa, Police Department. At all relevant times, he was acting in such capacity as the agent, servant and employee of Defendant, City of Odessa. He is sued in his individual and official capacities.

9. At all times relevant hereto, Defendant Preston Stevens was an Assistant District Attorney employed by Ector County, Texas. He is sued in his individual and official capacities.

10. At all times relevant hereto, Defendant Joe Connally was a Judge of the 244th Judicial District Court of Ector County. He is sued in his individual and official capacities.

11. At all times relevant hereto and in all their actions described herein, Defendants Orras, Stevens and Connally were

acting under color of law and pursuant to their authority as governmental officials.

12. Defendant John Smith is the present District Attorney of Ector County, and is sued in his official capacity only.

III. FACTUAL ALLEGATIONS

13. On December 3, 1986, Defendant Orras, working as an undercover police officer, approached Reymundo Canava to purchase a "paper" of heroin for $25.00. The transaction occurred in front of Canava's residence, in an automobile furnished by Orras, and was under surveillance by other police officers 200 to 300 yards away.

14. In the course of the transaction, Plaintiff arrived at Canava's residence in a Yellow Cordoba automobile. Canava then got out of Orras' car and got into Plaintiff's Cordoba. Plaintiff then purchased a "paper" of heroin from Canava for $25.00. Although Orras and the officers who were conducting surveillance did not see exactly what occurred in the Cordoba, they did see Canava and Plaintiff exchange something. After Canava got out of Plaintiff's

Cordoba, Plaintiff departed and Canava returned to Orras' vehicle and sold heroin to Orras.

15. On or about February 11, 1987, both Canava and Plaintiff were arrested for the sale of heroin to Orras. Furthermore, Plaintiff's 1978 Chrysler Cordoba automobile was seized pursuant to a civil forfeiture action. The arrests and forfeiture stemmed from the December 3, 1986, transaction and police observation of Plaintiff at the scene.

16. Canava was tried and convicted on July 22, 1987, in cause number C-18,564 for the sale of heroin to Officer Orras on December 3, 1986. District Judge Tryon D. Lewis presided over Canava's trial. Canava's testimony at trial consisted of only twenty-one lines and did not implicate Plaintiff in any way regarding the sale of heroin to Orras.

17. On or about February 4, 1988, Plaintiff was also tried for the sale of heroin to Officer Orras on December 3, 1986. District Judge Joe Connally, of the 244th Judicial District Court of the State of Texas presided over Plaintiff's trial and John Smith was Plaintiff's

counsel for such trial.

18. At trial, Plaintiff Sanchez sought to have Canava called to testify that Plaintiff did not participate in the sale of heroin from Canava to Orras. On the record of Plaintiff's trial, presiding Judge Connally represented that he had presided over Canava's trial, and that based on Connally's knowledge of Canava's testimony, Canava's testimony would hurt Plaintiff's case. As if to confirm his misrepresentations, Connally took judicial notice of the contents of Canava's trial folder, cause number C-18-564, and told Plaintiff "you can take my word for it that Mr. Canava's testimony does not help you but in fact hurts your case ." In fact and unknown to Plaintiff at this time, Judge Lewis, not Connally, presided over Canava's trial. Equally untrue and unknown to Plaintiff, Canava did not offer testimony at trial which incriminated Plaintiff Sanchez, but rather never mentioned Sanchez in his 21 lines of testimony. In fact, Canava later submitted an affidavit to the effect that on December 3, 1986, Canava had not purchased heroin from Plaintiff Sanchez, but instead had sold heroin to Plaintiff.

19. Plaintiff's desire to call Canava as a witness in his defense led to a hearing before Judge Connally. Instead of ruling on whether Plaintiff should be allowed time to retain new counsel, Judge Connally stated to Plaintiff and his counsel, Defendant John Smith, how Canava had testified at his own trial and how that testimony would be harmful to Plaintiff. Moreover, Judge Connally used his false statements of what Canava's testimony was (that he claimed to have heard in the previous trial) to threaten to revoke Plaintiff's bond and place him in jail pending a resetting of his case if he persisted in his desire to change lawyers. Plaintiff finally stated that he did not want to go to jail and Judge Connally ordered the trial to proceed. Despite Plaintiff's instructions and pleas to the contrary, his counsel, Defendant John Smith, agreed with Judge Connally and refused to call Canava to testify.

20. Defendant Preston Stevens, Assistant District Attorney for Ector County, was the prosecutor for Plaintiff's trial. In the course of the trial, Defendant Stevens knowingly or recklessly elicited perjured testimony from Defendant Orras regarding the circumstances

of the December 3, 1986 transactions. At trial, Orras testified, in effect, that he had witnessed Plaintiff sell heroin to Canava. However, this was contrary to the facts and Orras' previous testimony in Canava's trial. Although Orras altered his testimony regarding circumstances directly related to Plaintiff's conviction, Orras' testimony was substantially similar in both trials regarding immaterial details.

21. On information and belief, Defendant Stevens knew, prior to the commencement of Plaintiff's trial that the facts that Orras proffered to him as his trial testimony in Plaintiff's prosecution were materially different from his Canava trial testimony because Stevens prosecuted Canava as well as Plaintiff. Stevens was also aware that Judge Lewis had presided over the Canava trial and that Canava had not testified to implicate Plaintiff in this trial. He also knew that Judge Connally had not presided over that trial or heard Canava's testimony as he represented to Plaintiff.

22. Together, Defendants Orras, Stevens and Connally conspired to deprive Plaintiff Sanchez of his privileges and

immunities and equal protection of the law by means of knowingly conveying false information to Plaintiff, on the record, with the intent to induce, threaten and intimidate Plaintiff to forgo certain constitutional rights including effective assistance of counsel and his right to a fair trial.

23. As a direct result of Defendants' actions, on February 4, 1988 Plaintiff was tried and convicted of the sale of heroin to Officer Orras on December 3, 1986; a crime which Plaintiff never committed. Plaintiff was sentenced to life imprisonment. These entire proceedings--jury selection, trial, conviction, punishment hearing, and sentencing--were concluded by 5:00 p.m. on February 4, 1988.

24. After being incarcerated for over five years, the action was finally terminated in favor of Plaintiff and an order of Dismissal was entered in Cause No. C-18,541 in the 244th Judicial District Court on or about May 10, 1994.

25. Defendant City of Odessa tolerated as an institutionalized practice, malicious prosecution, the use of perjury,

misinformation and official misconduct to deprive Plaintiff of his constitutional rights in regards to criminal cause numbers C-18,564, C-18,565 (Canava) , C-18,541 (Sanchez), and in other arrests and prosecutions presently unknown to Plaintiff but within the knowledge of said Defendant, by establishing a pattern, practice or custom of police officers distorting facts and proffered testimony in order to secure improper convictions, as evidenced by Orras' contradictory statements and untruthful testimony between Canava's and Plaintiff's trial.

26. As a consequence of the abuse of authority detailed above, Plaintiff sustained damages as set forth below.

IV. FEDERAL ACTIONS

27. The allegations set forth in paragraphs 1 through 26 are incorporated herein by reference.

28. The above described actions and omissions, engaged in under color of state and local authority by the Defendants, including Defendant City, sued as a person, responsible because of its authorization, condonation, and ratification thereof for the acts of its

agents, deprived the Plaintiff of rights secured to him by the Constitution of the United States, including, but not limited to, his fifth, sixth, and fourteenth amendment rights in violation of 42 U.S.C. § 1983.

A. Violations of Plaintiff's Civil Rights by Defendant Orras

29. On information and belief, Defendant Orras made a false report both orally and in writing for the purpose of implicating and attempting to incriminate Plaintiff as having committed a felony crime, specifically the delivery of heroin to Canava from whom Defendant Orras purchased a "paper" of heroin. He withheld material information from his oral and written reports, which was later revealed in his testimony in Canava's trial on his related case, which occurred in advance of Plaintiff's state criminal trial. He also included some false information in his early reports of the incident, which is contrary to his sworn testimony and is also at odds with the one statement under oath attested to by Canava prior to his death from stomach cancer.

30. In making these reports to his superiors and to

prosecutors including Defendant Stevens, Defendant Orras knew that he did not have probable cause to believe that Plaintiff had committed a crime in his presence, or in the alternative, he acted recklessly and with a conscious disregard for Plaintiff's constitutional rights and whether or not probable cause existed to report that Plaintiff had committed a felony crime.

31. As a direct and proximate result of Defendant Orras' acts and omissions herein described, Plaintiff was charged, indicted, tried, convicted and sentenced for a crime he did not commit and for which the State eventually agreed he should receive a new trial. Ultimately, after six months, the State declined to prosecute him a second time.

32. Defendant Orras' conduct hereinabove described has caused Plaintiff damage as described hereinbelow in violation of 42 U.S.C. § 1983.

B. Civil Rights Violations by Defendant City of Odessa

33. On information and belief, the deprivation of rights to which Plaintiff was subjected as detailed above was consistent with

an institutional practice and custom as described in paragraph 25 above, by the Police Department of the City of Odessa, which was known to and ratified by Defendant City of Odessa, said Defendant having at no time taken any effective action to prevent police personnel from continuing to engage in such conduct.

34. On information and belief, Defendant Odessa authorized, tolerated as institutional practices, and ratified the misconduct hereinabove detailed by:

(a) Failing to properly discipline and supervise officers who furnish false information to establish probable cause to charge commission of a crime;

(b) Failing to take adequate precautions to identify and discourage officers from accusing individuals of crimes without facts that establish probable cause;

(c) Failing to monitor officers who are potential witnesses in criminal prosecutions to see that they do not fabricate false facts to give prosecutors for the purpose of instigating or furthering a prosecution for which there is no probable cause;

(d) Failing to respond to and follow-up complaints of police misconduct in instigating and furthering prosecutions without probable cause; and

(e) Failing to investigate convictions based on inconsistent and possibly perjurious police testimony.

35. As a consequence of the abuse of authority detailed above, Plaintiff has sustained damages as hereinbefore alleged in violation of 42 U.S.C. § 1983.

C. Civil Rights Violations by Defendant Stevens

36. Defendant Stevens served as the prosecutor in both the trials of Canava and Plaintiff Sanchez, both of which charges and indictments arose out of a single sale of heroin by Canava to Defendant Orras. Thus, Defendant Stevens had actual knowledge of what had transpired in his prosecution of Canava: he had knowledge that Canava had not testified on the merits of the case against him; he had knowledge that Orras was agreeing and offering to testify to new and different facts than he had presented in the Canava case.

37. Armed with this knowledge, Defendant Stevens

ratified, approved, and condoned by his actions Defendant Connally's misstatements and misrepresentations of the Canava trial record that he made in Defendant Stevens' presence.

38. Defendant Stevens by his conduct in the presence of Defendant Connally's statements concerning the Canava trial record and his statements concerning the effect that Canava's testimony would have in Plaintiff's case, participated in and so ratified, approved and condoned Defendant Connally's direct and unauthorized interference in Plaintiff's attorney-client relationship. This interference, although initiated by Defendant Connally, could not have been carried out without Defendant Stevens' cooperation.

39. Defendant Stevens' cooperation and condonation of Defendant Connally's unauthorized interference in Plaintiff's attorney-client relationship enabled his prosecution of Plaintiff to go forward without a continuance, a change in defense counsel, or the issuance of defense subpoena for Canava; all of which Plaintiff was seeking.

40. Plaintiff's deprivation of these opportunities resulted in a denial to him of effective assistance of counsel and a denial of his

right to a fair trial, due process and equal protection of the laws, all of which are guaranteed to him by the Fifth, Sixth, and Fourteenth Amendments to the Constitution of the United States, all in violation of 42 U.S.C. § 1983.

41. Defendant Stevens also deprived Plaintiff of his right to be free from unreasonable seizure of his person and his property and his right to due process by instigating a prosecution that was groundless and without probable cause. He knew that without new and different testimony from Defendant Orras other than what he had testified to in the Canava trial, he could not produce evidence that Plaintiff had committed any crime. On information and belief, Defendant Stevens knew prior to Plaintiff's trial commencing that Defendant Orras proposed to fabricate his testimony in order to secure Plaintiff's conviction for delivery of heroin. Defendant Stevens proceeded with his prosecution of Plaintiff with the knowledge that in doing so, he would deprive Plaintiff of his right to due process and a fair trial. Moreover, Defendant Stevens reasonably knew that the combination of Defendant Orras' fabricated story to

incriminate Plaintiff combined with the unavailability of Canava as a witness to contradict Defendant Orras' version of the events, a conviction would almost surely result. Just as surely, Defendant Stevens knew that he would obtain Plaintiff's conviction by making use of Defendant Orras' fabricated story together with Defendant Connally's unauthorized interference in Plaintiff's attorney-client relationship.

42. Defendant Stevens' conduct hereinabove described has caused Plaintiff damages as alleged hereinbelow in violation of 42 U.S.C. § 1983.

D. Civil Rights Violations by Defendant Connally

43. Defendant Connally acted outside his judicial function and authority but under color of law when he made certain materially false statements to Plaintiff and his defense counsel, Defendant Smith prior to the commencement of Plaintiff's trial. Defendant Connally calculated his statements to overcome Plaintiff's decision to seek new counsel who would subpoena and call Canava as a witness at his trial. These statements corrupted the attorney-client relationship and

had the effect that Defendant desired. Plaintiff proceeded to trial with Defendant Smith as his counsel and without a subpoena for or the testimony of Canava.

44. Defendant's statements as to Canava's past testimony and its impact on Plaintiff's case were unauthorized, baseless and false. Their effect was to deny to Plaintiff effective assistance of counsel and his right to a fair trial.

45. As a direct result of Defendant Connally's actions, Plaintiff was convicted for a crime that he did not commit, deprived of his liberty for five years and seven months, and subjected to damages as alleged hereinbelow in violation of 42 U.S.C. § 1983.

E. Civil Rights Violations by the District Attorney

46. The District Attorney for Ector County, Defendant Smith, is sued in his official capacity in that his office failed to adequately train and supervise its assistants such as Defendant Smith in order to prevent the deprivation of civil rights that Plaintiff has suffered. Moreover, the District Attorney failed and refused to investigate, monitor or review the conduct of Plaintiff's case in the

period following his conviction on February 4, 1988 until he was granted a new trial on August 26, 1993. This policy of official denials and refusals persisted despite the receipt of Plaintiff's appeal, two post-conviction applications for habeas corpus and the federal habeas corpus action by the office of the District Attorney.

47. Through inadequate training, supervision, investigation and monitoring, the District Attorney condoned, ratified, and approved Defendant Stevens' conduct of the prosecution of Plaintiff and his life imprisonment for a crime he did not commit.

48. As a direct result of Defendant Smith's actions, Plaintiff was convicted for a crime that he did not commit, deprived of his liberty for five years and seven months, and subjected to damages as alleged hereinbelow in violation of 42 U.S.C. § 1983.

F. Conspiracies to Deprive Plaintiff of Rights and Privileges And to Obstruct the Due Course of Justice

49. Defendants as alleged above, by their acts and omissions in relation to Plaintiff's prosecution, trial, conviction, and imprisonment, conspired to deny to Plaintiff equal protection of the

law and equal privileges and immunities under the law and to obstruct the due course of justice, which constitute violations of 42 U.S.C. § 1985(2), (3).

50. Defendants were motivated in their conduct by a racial animus against members of the Hispanic race such as Plaintiff, which has given rise to their belief, confirmed in their conduct toward Plaintiff, that members of Plaintiff's racial and socio-economic class are not entitled to equal protections, privileges and immunities under the law as other persons generally, and similarly, are not entitled to the due course of justice.

51. As a direct result of Defendants' conspiracies, Plaintiff was convicted for a crime that he did not commit, deprived of his liberty for five years and seven months, and subjected to damages as alleged hereinbelow.

G. Deprivation of Property

52. The civil forfeiture of Plaintiff's 1978 Chrysler automobile constitutes a second punishment for the same crime for which Plaintiff was criminally prosecuted in violation of the United

States Constitution's Fifth Amendment prohibition against double jeopardy.

53. As a direct result of Defendants' conduct hereinabove alleged, Plaintiff was deprived of his automobile. This unauthorized forfeiture damaged Plaintiff in the loss of the automobile worth approximately $1,200.00 plus interest on said amount from the date of forfeiture until judgment, for which sum Defendants are liable.

H. Attorney's Fees and Costs

54. It has been necessary for Plaintiff to employ the undersigned attorney to represent him in this matter and pursuant to 42 U.S.C. § 1988 he is entitled to recover a reasonable attorney's fee, any expert fees and costs in order to vindicate his civil rights.

V. PENDENT ACTIONS

55. This Court has pendent jurisdiction to hear and adjudicate the following claims.

56. The allegations set forth in paragraphs 1 through 53 are incorporated herein by reference.

A. The Tort Claims Act

57. All conditions precedent to the maintenance of this action against the governmental units named as Defendants have been complied with or have occurred.

58. Plaintiff suffered personal injuries when Plaintiff was wrongfully prosecuted and convicted for the sale of heroin, sentenced to life imprisonment and subsequently incarcerated for over five years.

59. Defendants, the City of Odessa; the 244th Judicial District Court of the State of Texas; Office of the District Attorney for Ector County; and Ector County, may be held to answer in a court of law for the occurrence just described because these claims arise from the use of tangible personal property by Defendants, so that sovereign immunity is waived under the Texas Tort Claims Act.

60. The occurrence described in this petition is a direct and proximate result of the negligence of the City of Odessa and its agents, servants, and officers in the following particulars: police officer Louis Orras and other police officers' negligent use of police

equipment and records.

61. The occurrence described in this petition is a direct and proximate result of the negligence of the 244th Judicial District Court of the State of Texas and its agents, servants, and officers separate and apart from any judicial function or duties of office in the following particulars: District Judge Joe Connally's negligent use of court transcripts and records.

62. The occurrence described in this petition is a direct and proximate result of the negligence of the Office of the District Attorney of Ector County and its agents, servants, and officers in the following particulars: Preston Stevens' negligent use of court transcripts and records.

63. The occurrence described in this petition is a direct and proximate result of the negligence of Ector County and its agents, servants, and officers in the following particulars: District Judge Joe Connally's negligent use of court transcripts and records; the Office of the District Attorney of Ector County and Preston Stevens' negligent use of court transcripts and records.

64. As the direct and proximate result of negligence of Defendants, Plaintiff has suffered severe personal injuries as set forth below.

B. Malicious Prosecution

65. The acts and conduct herein before alleged constitute malicious prosecution by Louis Orras and Preston Stevens. Both Defendants acted without probable cause in initiating the prosecution of Plaintiff. Both acted maliciously in instigating the prosecution, supporting perjury and failing to correct the trial court's misrepresentations in favor of justice. As a proximate result of the criminal prosecution, Plaintiff suffered damages as more particularly described below.

C. Actual Fraud

66. Defendant Connally knowingly made false representations as to material facts to Plaintiff and knowingly concealed material information from Plaintiff with the intent of inducing Plaintiff to either plead guilty or forego his request for new counsel and the right to call Canava as a witness in his case.

Defendant Connally knowingly made the false representations to Plaintiff referred to in paragraphs 1 through 53, above, relating to the alleged prior testimony of Canava.

67. Each and every one of the representations and facts concealed concerned material facts. But for Connally's false representations and Defendant Stevens' concealment of material facts, Plaintiff would have insisted on his right to obtain Canava's testimony at his trial or requested that the Canava trial record be made available to him. Each and every one of Connally's representations was relied upon to Plaintiff's substantial injury.

68. By reason of Plaintiff's reliance on Defendant Connally's representations and fraudulent concealment of the material facts described above, Plaintiff has been damaged in an amount far in excess of the minimum jurisdictional limits of the Court as described more fully below.

69. Plaintiff further alleges that by reason of the fact that Defendant Connally knew that the representations described above were false at the time they were made, the representations were

willful and malicious and constitute conduct for which the law allows the imposition of exemplary damages.

D. Fraud By Silence

70. Defendant Stevens knowingly concealed material information from Plaintiff with the intent of inducing Plaintiff to either plead guilty or forego his request for a continuance. Since Defendant Stevens was the prosecutor for the Canava case, he was aware that Judge Connally was not the presiding judge of that case and he was also aware that Canava's testimony was not harmful to Plaintiff. As an officer of the court, Defendant Stevens had a duty to alert Plaintiff to the falsity of Defendant Connally's representations. Instead, by his silence, Defendant Stevens allowed Plaintiff to rely on Judge Connally's misrepresentations.

71. Defendant Stevens' failure to disclose was intended to induce Plaintiff to rely on Judge Connally's false representations. In fact, Plaintiff did rely on Defendant Connally's representations.

72. Each and every one of the representations and facts concealed concerned material facts. But for Connally's false

representations and Defendant Stevens' concealment of material facts, Plaintiff would have insisted on his right to obtain Canava's testimony at his trial or requested that the Canava trial record be made available to him. Each and every one of Connally's representations was relied upon to Plaintiff's substantial injury.

73. By reason of Plaintiff's reliance on Defendant Connally's representations and Defendant Stevens' fraudulent concealment of the material facts described above, Plaintiff has been damaged in an amount far in excess of the minimum jurisdictional limits of the Court.

74. Plaintiff further alleges that by reason of the fact that Connally and Defendant Stevens knew that the representations described above were false at the time they were made, the representations were willful and malicious and constitute conduct for which the law allows the imposition of exemplary damages.

E. Intentional Infliction of Emotional Distress

75. By engaging in the conduct set forth herein above, Defendant Connally acted intentionally or recklessly. In particular,

Defendant Connally made false representations as to material facts to Plaintiff relating to the alleged prior testimony of Canava with the intent of inducing Plaintiff to either plead guilty or forego his request for a continuance and an opportunity to obtain new counsel. Defendant Connally further pressured Plaintiff after providing this false information by giving Plaintiff the "option" of going to jail pending a new trial setting. Specifically, Defendant Connally states:

> I am not going to leave you out on bond particularly when the testimony I have heard in the previous trial indicates that you had more to do with the transaction than Mr. Canava.
>
> . . .
>
> Are you willing to be confined in jail until your case is reached for trial . . . [After interrupting Defendant's response] I want you to answer my question. Do you want to go to jail and wait until your case comes up again?

76. The conduct of Defendant Connally was extreme, outrageous, and beyond all possible bounds of decency.

77. As a direct and proximate result of the conduct of Defendant Connally, Plaintiff suffered severe emotional distress.

VI. NO OFFICIAL IMMUNITY

78. Paragraphs 1 through 77 are hereby incorporated by reference as though fully set forth here.

79. The liability of the individual Defendants, in their individual capacities, are not barred by the doctrine of official immunity because their unlawful actions were not taken in good faith. Further, their actions violated Plaintiff's clearly established constitutional rights and reasonable persons in Defendants' positions would have so recognized. They grossly violated Plaintiff's constitutional rights with no corresponding benefit to the State of Texas, Ector County, or the City of Odessa. Because there is no "state interest" in convicting an innocent man, they are not immunized from suit.

80. In summary, Plaintiff pleads that each of the following applies to each Defendant individually and thereby overcomes their qualified immunity;

a) that through an abuse of governmental power a constitutional right was deprived the

Plaintiff;

b) that this action was taken contrary to clearly established law that a reasonable official would know; and

c) that no reasonable objective official could take the alleged unlawful actions and not be aware that such acts deprived Plaintiff of his rights.

VII. DAMAGES

81. As a direct and proximate result of the Defendants' conduct, Plaintiff has suffered lost wages, decreased earning capacity, loss of liberty, loss of time, loss of civil rights for a period of over five years, emotional pain, mental anguish, embarrassment, and humiliation, all of which he has suffered in the past and will continue to suffer in the future, injuries to health, character, and reputation, in a sum in excess of the minimum jurisdictional limits of the Court, loss of property and the incurring of expenses, including attorney's fees in connection with his defense and appeal and bond fees for the charges that were lodged against him.

82. In doing all the acts herein alleged, Defendants acted with malice or with reckless indifference for the rights of Plaintiff. Plaintiff, therefore, is entitled to recover exemplary damages from Defendants. Accordingly, Plaintiff sues for exemplary damages in a sum in excess of the minimum jurisdictional limits of this Court.

VIII. INJUNCTION

83. The harm suffered by Plaintiff will be irreparable and in great part intangible, and Plaintiff will have no adequate remedy at law to compensate himself for this harm. Plaintiff therefore requests a permanent injunction ordering the expunction of all records of Plaintiff's arrest, indictment, prosecution, conviction, and sentencing.

IX. PRAYER

WHEREFORE, Plaintiff, Eugenio R. Sanchez, demands the following relief jointly and severally, against all the Defendants:

A. A permanent injunction ordering Defendants to expunge all records referencing Plaintiff's arrest, indictment, prosecution, conviction, and sentencing;

B. Actual damages;

C. Compensatory damages;

D. Exemplary damages against the individual Defendants;

E. Costs and Attorney's fees pursuant to 42 U.S.C. § 1988;

F. The return of Plaintiff's 1978 Chrysler automobile, or its monetary equivalent as of February 1987;

G. Pre-judgment and postjudgment interest at the lawful rate; and

H. Such other and further relief this Court may deem appropriate under the circumstances.

Respectfully submitted,

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APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

EUJENIO R. SANCHEZ,	§	
PLAINTIFF	§	
V.	§	**Civil Action No.MO95CA039**
	§	
ECTOR COUNTY, TEXAS;	§	
CITY OF ODESSA, TEXAS;	§	
LOUIS ORRAS;	§	
JOE CONNALLY;	§	
JOHN SMITH, IN HIS	§	
OFFICIAL CAPACITY;	§	
PRESTON STEVENS;	§	
244TH JUDICIAL DISTRICT	§	
COURT	§	
OF THE STATE OF TEXAS;	§	
OFFICE OF THE DISTRICT	§	
ATTORNEY FOR	§	
ECTOR COUNTY,	§	
DEFENDANTS	§	

PLAINTIFF'S BRIEF ON OFFICIAL IMMUNITY

October 20, 1995

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Plaintiff's First Amended Complaint has been served via certified mail, return receipt requested on this 20th day of July, 1995 to the following counsel of record:

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Richard W. Alexander

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

EUJENIO R. SANCHEZ,	§	
PLAINTIFF	§	
V.	§	**Civil Action No.MO95CA039**
	§	
ECTOR COUNTY, TEXAS;	§	
CITY OF ODESSA, TEXAS;	§	
LOUIS ORRAS;	§	
JOE CONNALLY;	§	
JOHN SMITH, IN HIS	§	
OFFICIAL CAPACITY;	§	
PRESTON STEVENS;	§	
244TH JUDICIAL DISTRICT	§	
COURT	§	
OF THE STATE OF TEXAS;	§	
OFFICE OF THE DISTRICT	§	
ATTORNEY FOR	§	
ECTOR COUNTY,	§	
DEFENDANTS	§	

PLAINTIFF'S BRIEF ON OFFICIAL IMMUNITY

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, Eujenio R. Sanchez, Plaintiff in the above-entitled and numbered action, and files this his Brief on Official Immunity pursuant to leave of Court granted on October 10, 1995, and would show the Court as follows:

I.

OVERVIEW OF THE ISSUES

This brief and accompanying Appendices A-P will address the arguments presented in the following pending motions concerning official immunity: Defendant City of Odessa's Motion to Dismiss for Failure to State a Claim upon Which Relief can be Granted and, Alternatively, for a More Definite Statement; Defendant Orras' Motion to Dismiss for Failure to State a Claim upon Which Relief can be Granted and, Alternatively, for a More Definite Statement; Defendant Joe Connally's Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(6); and Defendants Preston Stevens, John Smith in His Official Capacity, and the Office of the District Attorney for Ector County's Motion to Dismiss Plaintiff's Complaint.

A. IMMUNITY GENERALLY

In Harlow v. Fitzgerald, 457 U.S. 800 (1982), the Court substantially reformulated the test for determining whether a governmental official acted in good faith and is entitled to the

affirmative defense of good faith immunity: "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Id. at 818. This immunity, also termed "qualified immunity," is the norm for executive branch officials.[1]

B. JUDICIAL IMMUNITY

The Court has held that judges are absolutely immune when they perform judicial acts.[2]

C. PROSECUTORIAL IMMUNITY

The Court has held that prosecutors are absolutely immune when performing prosecutorial acts.[3]

---

[1]Buckley v. Fitzsimmons, 113 S. Ct. 2606, 2614 (1993).

[2]Stump v. Sparkman, 435 U.S. 349 (1978).

[3]Imbler v. Pachtman, 424 U.S. 409 (1976).

II.

THE STANDARD

The Defendants' motions to dismiss should be denied "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."[4]

III.

THE FACTS

The factual allegations that overcome Defendants' claims of immunity are found in paragraphs 13-51 of Plaintiff's First Amended Complaint. For the most part these facts are beyond dispute because they are established in the various records of the Plaintiff's and Canava's trial and Plaintiff's appeal and post-conviction proceedings.

The more significant facts from these sources are summarized below:

1. Both the State, represented by the Texas Attorney General's office and Plaintiff agreed that Plaintiff was entitled to have

---

[4]Rankin v. City of Wichita Falls, 762 F.2d 444, 446 (5th Cir. 1985) quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

his 1988 conviction set aside and receive a new trial. See Appendix A, attached hereto.

2. Plaintiff insisted on calling Reymundo Canava as a defense witness at his trial until Defendant Connally made false statements about Canava's prior testimony and stated his beliefs about Plaintiff's involvement in committing the crime alleged based on his false restatement of Canava's testimony. See Appendix B, attached hereto.

3. In his trial, Reymundo Canava testified only to plead his 5th Amendment right not to be a witness and did not testify in any way that negatively effected Plaintiff. Furthermore, Defendant Connally did not preside at the Canava trial. Defendant Stevens was well aware of this since he had prosecuted Canava before a different judge. See Appendix O (Canava trial testimony).

4. Defendant Connally represented to Plaintiff that his statements about Canava's trial testimony were based on the contents of the trial record which had been prepared for appeal. Appendix B,

p. 11.

5. Defendant Stevens was the prosecutor who conducted the Canava trial for delivery of heroin. His silence in the face of Defendant Connally's statements about Canava's testimony and its adverse implications for Plaintiff's defense, amount to a ratification and condonation of Connally's statements. Plaintiff's First Amended Complaint, pp. 9-10.

6. Defendant Orras testified to facts in Plaintiff's trial that were materially different from his testimony in the Canava trial and were not contained in any of his reports or affidavits. Plaintiff's First Amended Complaint, p. 7. See also Appendix P (state habeas corpus application excerpt with attached trial testimony discussing material differences in Orras' testimony).

7. Defendant Stevens reasonably knew that without inculpatory testimony from Orras as to Plaintiff's delivery of heroin to Canava, he would have no evidence to implicate Plaintiff in a sale of heroin to Canava. Thus, Defendant Stevens reasonably had to have

known what Defendant Orras's testimony would be in Plaintiff's trial before the trial began and that this testimony would differ significantly from the content of Orras's police report and arrest warrant affidavit and his Canava trial testimony. Anything less requires one to presume that a state prosecutor would begin his case without knowing how he would attempt to prove the guilt of the accused. Plaintiff's First Amended Complaint, p. 9.

8. At the hearing on Plaintiff's Motion for New Trial, Defendant Connally again made false statements concerning Canava's testimony and Defendant Stevens again took no action and by his silence ratified Defendant Connally's misstatements. See Appendix C, p. 36, attached hereto.

9. On Plaintiff's first petition for state habeas corpus, the Criminal Court of Appeals remanded the case for findings of fact and conclusions of law and an affidavit by Plaintiff's trial counsel. See Appendix D and E, attached hereto. Defendant Connally and John Smith, Plaintiff's criminal defense counsel continue to perpetrate the

false version of Canava's trial testimony and the lie that it would inculpate Plaintiff. Defendant Stevens and the District Attorney's office by their response to Plaintiff's appeal continued to support this false story.

10. Plaintiff raised the issue of the potential Canava testimony again in his second petition for a state writ of habeas corpus. See Appendices K and L. Defendants Connally and Stevens continued their concert of action and cover-up concerning Canava's prior testimony in an effort to see that Plaintiff was denied any relief.

11. Plaintiff's petition for federal habeas corpus took the case out of Defendants Connally and Stevens' hands with the result that the State, now represented by the Attorney General's office, did not contest Plaintiff's right to a new trial under the circumstances presented in his petition for federal post-conviction relief, which had also been presented in his second petition for state habeas corpus.

12. The State declined to retry Plaintiff and the charges against him were dismissed on May 10, 1994. Plaintiff's First

Amended Complaint, p. 6, ¶ 24.

IV.

JUDICIAL IMMUNITY

A. THE LAW OF JUDICIAL IMMUNITY

Application of absolute judicial immunity depends upon a positive response to each of the following two questions: (1) were the acts of which Plaintiff complains "judicial ones" and (2) were those acts "clearly outside" the judge's jurisdiction?[5]

B. THE ACT THAT HARMED PLAINTIFF WAS NOT A JUDICIAL ACT

Was the act a "judicial" one is the first inquiry. The factors that determine whether a judge's act is a "judicial" one are (1) whether the act complained of is one normally performed by a judge, (2) whether the act occurred in the courtroom or an appropriate adjunct such as the judge's chambers, (3) whether the controversy centered around a case pending before the judge, or (4) whether the

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[5]Stump v. Sparkman, 435 U.S. 349 (1978).

act arose out of a visit to the judge in his judicial capacity.[6] Not all of the factors must be met for immunity to exist.[7]

Under the first McAlester factor, the precise act of which Plaintiff complains is not a normal judicial function. Defendant Connally's opinion expressed directly to Plaintiff that Canava's testimony would harm Plaintiff's case, is not a normal judicial function. Such a non-judicial act constituted the rendition of an advisory opinion, interfered with the right to counsel, and interfered with the due course of justice--the right to obtain witnesses.

a. Rendition of An Advisory Opinion

A decision that does not bind the parties is, by definition, an advisory opinion prohibited by Texas law.[8] An advisory opinion is

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[6]McAlester v. Brown, 459 F. 2d 1280, 1282 (5th Cir 1972).

[7]Malina v. Gonzales, 994 F.2d 1121, 1124 (5th Cir. 1993); Adams v. McIlhany, 764 F.2d 294, 297 (5th Cir. 1985), cert. denied 474 U.S. 1101 (1986).

[8]State Bar of Texas v. Gomez, 891 S.W.2d 243 (Tex. 1994).

one which "adjudicates nothing and is binding on no one."[9]

An advisory opinion results when a court attempts to decide an issue that does not arise from an actual controversy capable of final adjudication.[10]

The function of the judiciary is to uphold the Constitution and, under appropriate circumstances, to refine and develop the common law. It is not to render advisory opinions.[11] The Texas Supreme Court has repeatedly held that under our state constitution, judicial power does not include the power to issue advisory opinions.[12] This

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[9]Gonzales v. State, 864 S.W.2d 522 (Tex. Crim. App. 1993) (concurring opinion on State's Petition for Discretionary Review, citing Douglas Oil Co. v. State, 81 S.W.2d 1064, 1077 (Tex.Civ.App.--Austin 1935)).

[10]Id.

[11]Edgewood Indep. Sch. Dist. v. Kirby, 34 Tex. Sup. J. 368 (Tex. 1991) (Concurring opinion on Motion for rehearing).

[12]Gonzales, 864 S.W.2d 522 (concurring opinion on State's Petition for Discretionary Review); Edgewood Indep. Sch. Dist., 34 Tex. Sup. J. 368; Correa v. First Court of Appeals, 795 S.W.2d 704, 705 (Tex. 1990); Firemen's Ins. Co. v. Burch, 442 S.W.2d 331, 333 (Tex. 1969); United Services Life Insurance Co. v. Delaney, 396 S.W.2d 855 (Tex. Sup. 1965); California Products,

matter is specifically addressed in the Texas Constitution, article 4, @@ 1, 22.[13]

In the absence of a constitutional provision authorizing the Texas courts to render advisory opinions, such power does not exist and may not be conferred by agreement of the parties.[14]

b. Interference with the Right to Counsel

Wrongful denial of the assistance of counsel will support a claim under section 1983.[15] Moreover, it has been clearly established that the relationship between attorney and client is a protected one into which the government must not intrude. For example, the Supreme Court has held that a trial court's order preventing a defendant from consulting his counsel during a 17 hour overnight

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Inc. v. Puretex Lemon Juice, Inc., 160 Tex. 586, 334 S.W.2d 780 (1960); Morrow v. Corbin, 62 S.W.2d 641, 643 (1933).

[13]Edgewood Indep. Sch. Dist. v. Kirby, 34 Tex. Sup. J. 368 (Tex. 1991).

[14]Firemen's Ins. Co. v. Burch, 442 S.W.2d 331 (Tex. 1968).

[15]Davis v. Turner, 197 F.2d 847 (5th Cir. 1952).

recess deprived him of effective assistance of counsel under the 6th Amendment.[16] Courts have also held in several contexts that government intrusion, either by guile through undercover informants attending meetings between the lawyer and client[17] or by direct meetings with a client without defense counsel's knowledge[18] or permission,[19] raises an issue as to whether 6th Amendment rights have been violated. The defendant then has the burden of showing prejudice: that there has been a "realistic possibility of injury " to the defendant or a "benefit to the state."[20]

Defendant Connally intruded into the conflict between attorney and client with the giving of false opinions as to whether or

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[16]Geders v. United States, 425 U.S. 80 (1976).

[17]Weatherford v. Bursey, 429 U.S. 545 (1977); United States v. Mastroianni, 749 F.2d 900 (1984).

[18]Cinelli v. City of Revere, 820 F.2d 474 (1st Cir. 1987).

[19]United States v. Morrison, 449 U.S. 361 (1981).

[20]Cinelli, 820 F.2d at 477 citing Morrison, 449 U.S. at 366; Weatherford, 429 U.S. at 558; Mastroianni, 749 F.2d at 907.

not Plaintiff should exercise his right to obtain a particular witness in his defense. His motives are irrelevant at this point;[21] his purpose was to overcome and overreach Plaintiff's determination to call a particular witness, a co-defendant, in his defense. This right "is in plain terms the right to present a defense."[22] Suddenly Plaintiff was no longer simply disagreeing with his defense attorney, but he was receiving critical and clear opinions and advice directly from the trial judge based presumably on the trial record of another case[23] and the judge's own recollections of having presided as the judge in that case and heard the probable testimony himself.[24] The judge was advising

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[21]Defendant Connally's printed words appear, in part, to be sarcastic and demeaning to Plaintiff. For example, he states, just as Plaintiff is being called to testify by his attorney "*All right. I'd like to make an announcement that he* [Mr. Sanchez] *wanted to go talk to his mother and that is not grounds for continuance to get another lawyer.*" Appendix B, p. 6, ll. 18-21.

[22]Washington v. State of Texas, 388 U.S. 14, 19 (1967). See also discussion at pp. 9-11, infra.

[23]Appendix B, p. 11.

[24]Appendix B, p. 13, ll. 11-25.

him in no uncertain terms that the testimony he sought to obtain would harm his case.[25]

Plaintiff has pleaded facts and contentions establishing both his injury and the benefit to the State of the fact that Canava did not testify in his defense case.[26] The right to effective assistance of counsel is a clearly established right[27] and Defendant Connally was aware at the time of advising Plaintiff on the impact of the Canava testimony that he was advising Plaintiff on the very matter over which Plaintiff wanted to discharge his attorney.[28] His advice to Plaintiff was calculated to interfere, and did interfere with whether Plaintiff would exercise his opportunity to obtain an attorney who would call

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[25]Appendix B, p. 11, ll. 11-13, 20-23.

[26]Plaintiff's First Amended Complaint, pp. 4-6, 9-12.

[27]Powell v. Alabama, 287 U.S. 45, 66-73 (1932) (6th Amendment right to counsel exists, is fundamental to fair trial, and is incorporated in Due Process clause of 14th Amendment).

[28]Appendix B, pp. 9, l. 24 -10, l. 6.

Canava as a defense witness.[29] Thus, Plaintiff was effectively denied the right to obtain a witness in his behalf by his present attorney and by Defendant Connally's false advice, he was denied an opportunity to obtain an attorney who would effectively assist him to obtain the witness he was seeking.

This intervention was uncalled for: no one requested any ruling that might make Defendant Connally's opinion of the impact of Canava's potential testimony relevant to any issue before Judge Connally for a ruling. It was unauthorized: Certainly, to call or not to call Canava was the issue dividing attorney and client, but it was not an issue within the Court's power to determine, and therefore, Defendant Connally's advisory opinion on this matter was an unwarranted invasion of the attorney client relationship the same as if Defendant Connally had sat down in conference with Plaintiff and Mr. Smith to assist them in selecting the jury, determining the topics

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[29]Compare Appendix B, p. 3, ll. 6-22; p. 4, ll. 8-19; pp. 5, l. 24 - 6, l. 3; pp. 8, l. 15 - 10, l. 6 with pp. 11, l. 2 - 12, l. 7; p. 13, l. 5 - p. 14.

of cross-examination, and any number of other decisions in which an accused is entitled to effective assistance of counsel.

Defendant Connally denied Plaintiff effective assistance of counsel not by judicial act, but by trickery. It was a trickery so complete[30] that it confined Plaintiff for five and one-half years until the State acquiesced to grant him a new trial, which resulted in a dismissal of the charges against him.

Both the significance of the constitutional right that Defendant Connally violated and his deliberate acts to that end unrelated to any judicial decision, must be evaluated in determining whether absolute immunity attaches.

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[30]Both Defendant Connally and defense counsel Smith filed documents in the Court of Criminal Appeals that are at best misleading and at worst fraudulent, that concealed the facts concerning Plaintiff's attempt to have Canava testify at his trial; Mr. Smith's affidavit demonstrates either how completely he was misled by Defendant Connally's misstatements or that he had joined the conspiracy to conceal evidence that could set aside Plaintiff's conviction. See Appendices E and F and discussion at Part VI, infra pp. 29-33 (conspiracy).

c. Interference with the Due Course of Justice--the Right to Obtain Witnesses.

In determining that the Sixth Amendment right to have compulsory process for obtaining witnesses in one's favor is applicable to the States through the Fourteenth Amendment, the Supreme Court observed:

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.[31]

It was Plaintiff's desire to call as one of his witnesses Reymundo Canava, who had been arrested out of the same incident as Plaintiff and who, at that time, had been tried, convicted, sentenced to 50 years and whose case was on appeal.[32] As discussed more fully

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[31]Washington v. State of Texas; 388 U.S. 14, 20 (1967).

[32]Appendix B, p. 11, ll. 2-13; p. 13, ll. 5-8.

elsewhere in this brief,[33] Plaintiff believed at the time of his trial that Canava would offer testimony to corroborate his defense to guilt--that he did not deliver heroin or anything else to Canava as alleged. Canava who sat in Plaintiff's car at the time of the alleged heroin delivery, was clearly in the best position to see and hear what occurred.[34] The only other witness to the alleged transaction was Officer Orras, a police undercover agent who was in another car some distance away and another police officer farther away who attempted to observe the scene through field glasses.

Certainly on the morning his trial was to begin, Plaintiff believed that Canava's testimony was relevant and material to his defense because he and his lawyer brought to Defendant Connally's attention the conflict between them over whether Canava would be called as a defense witness. The details of that proceeding are

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[33]See discussion and accompanying notes, p. 13, infra.

[34]Compare facts in Washington v. State of Texas, 388 U.S. 14, 15-17 (1967) (refusal to allow co-defendant to testify for accused).

discussed below, however, the record makes clear that Defendant Connally first denied a continuance for Plaintiff to substitute a new lawyer who would call Canava to testify and then offered Plaintiff the option of a continuance to obtain a new lawyer but his bond would be revoked (presumably because Canava had incriminated him in his testimony in his own trial[35] and he would go to jail until his trial came up again.[36] It is what occurred between Defendant Connally's initial denial of Plaintiff's request to change lawyers and his later offer of a delay that causes this case to arise: Defendant Connally advised Plaintiff on what Canava's probable testimony would be and predicted its damaging impact on Plaintiff's case. This act was calculated deliberately to interfere with Plaintiff's right to compel the attendance of witnesses in his behalf. Defendant Connally in this interval, not only stepped out of the role of what judges do, but also stepped into the role of what defense lawyers do: advising the accused on how and

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[35]See Appendix B, p. 13, ll. 16-21 (this statement has not support in the Canava trial record).

[36]Appendix B, pp. 13-14.

if he should exercise his Sixth Amendment right to call a particular witness in his defense. As the record amply demonstrates, Defendant Connally's opinions about the harmful impact of Canava's testimony in Plaintiff's case destroyed Plaintiff's resolve to compel Canava's attendance as a witness and he determined not to accept Defendant Connally's offer to change counsel and return to jail.[37]

As we now know from the Canava trial record, virtually all of Defendant Connally's statements about Canava's testimony in his own trial were false since he did not hear the prior Canava matter and since Canava had merely pleaded the 5th Amendment. Defendant Connally's opinions on the harmful effect of Canava's testimony in Plaintiff's trial or possible perjury charges against Canava if he changed his testimony from his trial are baseless and completely misleading.[38] Accordingly, Defendant Connally, by giving Plaintiff and his attorney advisory opinions on the harmful effect of Canava's

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[37]See note 29, supra.

[38]See Plaintiff's First Amended Complaint, p. 3, ¶ 16.

testimony on Plaintiff, blocked and obstructed Plaintiff's attempt to exercise his Sixth Amendment right to compulsory process to obtain Canava's testimony for his defense.

The result of Defendant Connally's actions was to deprive Plaintiff of exculpatory evidence that would likely have produced a different result at his trial and avoided his loss of five and one-half years in prison for a crime for which he never should have been convicted. Defendant Connally also set in motion a conspiracy to cover up the false basis of his statements both before[39] and after the trial[40] concerning the Canava testimony.

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[39](Appendix B, pp. 11, 13.)

[40](Appendix C, p. 36) (Defendant Connally's statements at the hearing on Motion for New Trial also misrepresented the conflict that existed between attorney and client just before trial began). See also Part VI, pp. 29-33, infra.

d. Application of Law to the Facts

The controversy before this Court for judicial immunity purposes is Defendant Connally's statements about the Canava testimony's probable impact on Plaintiff and his criminal trial. Applying the first McAlester factor, the precise act complained of, the giving of these opinions, is not a normal judicial function. This case was to be tried before a jury as the finder of fact so that any evaluation or opinion about the impact of potential testimony by Canava would be their job to decide. Moreover, advisory opinions by Texas courts on any subject are not authorized. A court in this state must restrict its decisions to the matters and the parties actually before it. A trial judge advising a criminal defendant, based on testimony the judge has heard in another trial, about whether his case before a jury will be harmed by a witness he is attempting to call, is not a normal judicial function. Probably nothing is so clear as the fact that Defendant Connally's false statements to Plaintiff had nothing to do with any judicial decision before Connally. The only

purpose that such statements could have and, in fact, did have was to interfere with and ultimately deny to Plaintiff his right to counsel and his right to call witnesses in his behalf.

Although Defendant Connally's false advice and statements appear on the record in open court[41], they do not relate to any judicial act or to a decision actually before Defendant Connally. The transcript of these interchanges between Plaintiff, Defendant Connally, John Smith, Plaintiff's criminal defense counsel, and Assistant District Attorney (and Defendant) Preston Stevens is entitled "Motion to Substitute Counsel" and occurred just prior to the jury panel being brought in to begin jury selection on February 4, 1988.[42] In the record of what occurred before the court, Plaintiff states that he has learned that Reymundo Canava is not going to be a

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[41]Appendix B, pp. 11-13.

[42]During this single day before 5:00 p.m. Plaintiff had jury selection, trial before a jury on guilt/innocence and on punishment, final argument on each phase, two jury deliberations and verdicts, was convicted and sentenced to life in prison. See Appendix H, attached hereto.

witness at his trial and he wants a lawyer who will work on his case and try it to the best of their ability. No motion was formally filed and no motion or ruling is noted on the docket sheet.[43]

The actual transcript of this so-called "motion" comprises a scant twelve and one-half pages of text. Mr. Smith begins by announcing that Plaintiff wants to have another lawyer handle his case and states that the court needs to hear from Mr. Sanchez. Plaintiff then addresses the court as follows:

> *THE COURT: Okay, Mr. Sanchez.*
>
> *THE DEFENDANT: Well, I do want Reymundo Canava here and I thought that he was going to be here and he's not and I wanted him to get him or the State's witness or whatever, you know, why isn't he here or what.*
>
> *Then I filed some motions and all of that and I don't know if you have them or not or what.*
>
> *THE COURT: Well, I don't even understand what you're saying. You filed some motions and you don't know what.* [44]

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[43]Appendix H.

[44]Appendix B, p. 3, ll. 13-25.

The judge then inquires of Plaintiff concerning his reasons for wanting to change lawyers:

> *THE COURT: You have a fine lawyer, is this just, this what you have told me your reasons for wanting to change lawyers?*
>
> *THE DEFENDANT: Well, sir, that's one of the reasons but I feel like that they just keep telling me like to take 20 years and this and that and that I'm going to get life instead of trying to work on my case. In other words, I feel like I can hire another lawyer that will try this case to the best of their ability.*[45]

At page 6 of the transcript, the court denies what he terms as a continuance to get another lawyer[46], but he allows Mr. Smith to call Mr. Sanchez as a witness because in Mr. Smith's words, "*We sure need to get some things on the record.*"[47] What proceeds for the next four pages are Plaintiff's repeated statements that he does not know why Mr. Canava cannot be at his trial as a witness.[48] Within his

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[45]Appendix B, p. 4, ll. 8-19.

[46]Appendix B, p. 6, ll. 18-21)

[47](Appendix B, p. 6, ll. 14-17)

[48](Appendix B, p. 8, ll. 18-25 through 9, line 1).

responses to Mr. Smith's questions are Mr. Sanchez's statements of his own innocence that he did not sell or give anything to Canava as the State has alleged.[49]

After listening to Plaintiff's testimony to the effect that he wanted Canava to be called to testify in his case, and hearing Mr. Smith's comments that "*we don't need Mr. Canava's testimony and you* [Mr. Sanchez] *disagree with that decision,*"[50] Defendant Connally proceeded to deliver his own opinion on the advisability of Plaintiff's decision to call Canava as his witness. On his own, Defendant

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[49]*Q* *But you think that Mr. Canava should have been subpoenaed?*
A *Yes, sir, they said, well, the State said that I gave it to him and then he gave it to the detective or something and then on the record and all of it says that I sold it to him.*
Q *That's right.*
A *See, I didn't sell him anything.*
Q *We have talked about the fact that the law says if you are a party to a transaction, you're just as guilty as the person who actually did it, is that correct?*
A *Maybe that's the law but I didn't give him anything.*
(Appendix B, p. 9, ll. 10-23).

[50](Appendix B, p. 9, ll. 24-25 through p. 10, ll.1-6)

Connally took judicial notice of the record in State v. Canava.[51] At this point Defendant Connally embarked on delivering an advisory opinion directly to Plaintiff on the impact that Canava's supposed testimony would have, if he were to be a witness in Plaintiff's trial: ". . . *because I feel, I just feel that you Mr. Sanchez, that Mr. Canava testified in that trial and that his testimony did nothing but harm you.*" (Appendix B, p. 11, ll. 10-13). Defendant Connally's opinion then went further to state what would happen if Canava attempted to change his trial testimony in order to help Plaintiff: "*And he* [Canava] *can't come in here and change his testimony without getting some more time for perjury.*" (Appendix B, p. 11, ll. 15-17). He then concluded, "*You can just tell, although a copy of the record can be made available to you, I guess, I don't know where all the copies are,*

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[51] *THE COURT: In the interest of the legal profession and particularly the District Attorney's office and the defense counsel, I am going to take judicial notice of the contents of the file in Cause No., styled the State of Texas vs. Reymundo Canava and of the Statement of Facts in that case which has been prepared, that case is on appeal, ...*

(Appendix B, p. 11, ll. 2-9)

but you can take my word for it that Mr. Canava's testimony does not help you but in fact hurts your case." (Appendix B, p. 11, ll. 18-23).

Now the impact on a criminal defendant such as Plaintiff of the trial judge's advance opinions of a potential defense witness can be presumed: the sitting trial judge has pronounced that the testimony that Plaintiff believed would exculpate him would instead be indicative of his guilt. Even Plaintiff's own attorney did not go that far (". . . *I made a decision that we don't need Mr. Canava's testimony and you* [Sanchez] *disagree with that decision.*" Appendix B, p. 9, l. 25 through 11, ll. 1-2). One need not presume this fact, however, because the transcript demonstrates that Plaintiff accepted Defendant Connally's conclusions about the probable impact of Canava's testimony on his case: "*Yes sir. Well, I believe that and everything . . . . I 'm sure he did* [testify] *to save himself and to put the blame on me . . .*" (Appendix B, p. 11, ll. 24-25; 12, ll. 3-4).

Following these exchanges, Judge Connally asks Plaintiff if

he wants a continuance to get another attorney and Plaintiff says no. (Appendix B, p. 12, ll. 23-25 through 13, ll. 1-4; 14, ll. 23-25). Thus, Plaintiff's resolve[52] to have Canava as a witness has been destroyed by Defendant Connally's statements about the impact of Canava's testimony on Plaintiff's guilt. Plaintiff proceeded to trial knowing that Canava had not been subpoenaed to appear and that his present lawyer, John Smith, would not call him as a witness.

The second McAlester factor, whether the acts involved occurred in the judge's chambers is satisfied.[53]

The third McAlester factor--whether "the controversy centered around a case then pending before the judge"--merits careful analysis

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[52] *Q* *Okay, that's our defense and I agree with you but the point is, I made a decision that we don't need Mr. Canava's testimony and you disagree with that decision.*

A *Yes, sir.*

Q *Now based on that, that's really why you're wanting to change lawyers, is that right?*

A *Yes, sir. That's the main fact.*

[53] Gregory v. Thompson, 500 F.2d 59 (9th Cir. 1974) (justice of peace denied immunity for assault in courtroom, location not controlling).

because, in this case it seems to beg the question. The "controversy" in the nature of Defendant Connally's opinions about the probable impact of potential Canava testimony did not center around a case pending before the court in that no one was seeking a ruling on whether Canava's testimony would help convict or acquit Plaintiff. It was Plaintiff's desire to call Canava and his lawyer's refusal to do so that was the controversy before the court when Defendant Connally pronounced his opinions on the probable Canava testimony. Thus, in this sense, the controversy in which Defendant Connally involved himself in stating his advisory opinions did not "center" around a case before the court. On the other hand, if one views the controversy before the court as Plaintiff's desire to have a lawyer who would call an important witness in his defense, then that controversy certainly centered around a case pending before the court--the charge against Plaintiff for delivery of heroin.

The fourth McAlester factor, whether the confrontation arose directly and immediately out of a visit to the judge in his official

capacity, also threatens to beg the question and deserves to be viewed on more than one level. The act--Defendant Connally's advising Plaintiff of the impact of Canava's testimony and Canava's exposure to perjury charges if he were to change his testimony to attempt to help Plaintiff--did not "arise directly" out of a visit to the judge in his official capacity because that issue--the probable impact of Canava's testimony if given in Plaintiff's trial--was the precise issue that only lawyer and client could resolve.[54] No one brought the issue of defense trial strategy to Defendant Connally for a ruling. The only issue before Defendant Connally that did arise out of the visit to the judge in his official capacity was whether Plaintiff was entitled to change lawyers under the circumstances presented to the court--the conflict between Plaintiff and his lawyer over whether to call Canava as a defense witness. Defendant as judge did rule on that issue--he

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[54]See Strickland v. Washington, 466 U.S. 668, 686 (1984) and cases cited therein (Government violates right to effective assistance of counsel when it interferes with the ability of counsel to make independent decisions). In this case, Defendant Connally's interference kept Plaintiff from discharging Smith.

permitted Plaintiff to have a continuance to change lawyers--but not before he gave Plaintiff some opinions very critical to Plaintiff's decision to have Canava as a witness even if it meant changing lawyers: he gave Plaintiff his advisory opinion not only on what the Canava testimony would be in Plaintiff's trial but what impact it would have on Plaintiff's defense (it would harm him) and whether Canava could change his potentially damaging testimony to help Plaintiff (it would expose him to "some more time for perjury"). Thus, the act of which Plaintiff complains did not arise directly out of a visit to the judge because it was an advisory opinion that Defendant Connally gave in order to influence Plaintiff on the issue that was before him for ruling--whether Plaintiff had a right under the circumstances that he presented to the court to change lawyers before his trial. On the other hand if one considers this factor literally, Defendant Connally's impermissible act--the advisory opinion--did arise out of Plaintiff's visit to the judge in his official capacity.

Given that the Plaintiff need not disprove all of the McAlester

factors, Plaintiff contends that his proof overcoming the first factor is sufficient to preclude immunity. Moreover, the third and fourth factors should be found to preclude immunity because Defendant Connally created the controversy by interfering with Plaintiff's substantial constitutional rights.

C. THE HARMFUL ACT WAS "CLEARLY OUTSIDE" THE JUDGE'S JURISDICTION.

The second prong for judicial immunity to apply is whether the act was "clearly outside" the judge's jurisdiction. In determining whether an act was clearly outside a judge's jurisdiction for judicial immunity purposes, the focus is not on whether the judge's specific act was proper or improper, but on whether the judge had the jurisdiction necessary to perform an act of that kind in the case.[55]

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[55]See Mireles v. Waco, 502 U.S. 9, 112 S.Ct. 286, 289, 116 L. Ed. 2d 9 (1991) (where judge was alleged to have authorized and ratified police officers' use of excessive force in bringing recalcitrant attorney to judge's courtroom, and thus have acted in excess of his authority, his alleged actions were still not committed in the absence of jurisdiction where he had jurisdiction to secure attorney's presence before him); Malina v. Gonzales, 994 F.2d 1121, 1124 (5th Cir. 1993) (because judge had power to cite for contempt and to sentence, where judge cited motorist for contempt

Under the Texas constitution, courts have no jurisdiction to render advisory opinions. Texas Constitution article II, @ 1. A court has no jurisdiction to render an advisory opinion on a controversy that is not yet ripe.[56]

In reference to advisory opinions, it has been said that "The giving of legal advice is the function of the legal profession, not the courts."[57]

In addressing issues arising under the Uniform Declaratory Judgment Act, the Texas Supreme Court has stated,

Despite some notions to the contrary, it does not

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and sentenced him to jail, these acts were within his jurisdiction, even though judge had acted improperly in stopping the motorist himself, privately using an officer to unofficially "summon" the motorist to court, and charging the motorist himself).

[56]Speer v. Presbyterian Children's Home & Serv. Agency, 847 S.W.2d 227 (Tex. 1993); City of Garland v. Louton, 691 S.W.2d 603 (Tex. 1985); California Products, Inc. v. Puretex Lemon Juice, Inc., 160 Tex. 586, 334 S.W.2d 780, 782 (1960); Morrow v. Corbin, 122 Tex. 553, 62 S.W.2d 641, 646 (1933).

[57]Centennial Ins. Co. v. Commercial Union Ins. Cos., 803 S.W.2d 479 (Tex. App.--[14th Dist.] Houston 1991, no writ), citing Firemen's Ins. Co., 442 S.W.2d 331, 333-34 (Tex. 1968).

> undertake to convert judicial tribunals into counsellors and impose upon them the duty of giving advisory opinions to any parties who may come into court and ask for either academic enlightenment or practical guidance concerning their legal affairs . . . This observation may be stated in the vernacular in this wise: "The Uniform Declaratory Judgment Act does not license litigants to fish in judicial ponds for legal advice."[58]

After Defendant Connally ruled that Defendant Smith would not be allowed to withdraw as counsel for Plaintiff and that there would be no continuance based upon the Plaintiff's request for new counsel, Defendant Smith then proceeded to make a record of the conflict between himself and the Plaintiff over whether Canava would be called to testify. It was during the making of this record when Defendant Connally interrupted the Plaintiff's testimony as to his desire for Canava to testify, to provide Plaintiff legal advice in the form of his opinion. Defendant Connally assumed the role of counsellor and advised Plaintiff that based upon his knowledge of Connally's prior testimony, it would be harmful for Plaintiff to insist

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[58]Firemen's Ins. Co. v. Burch, 442 S.W.2d 331 (Tex. 1968).

upon having Canava testify. Defendant Connally, like lawyers often do when presenting a strategy decision to their client, advised Plaintiff that he should "take his word for it."[59] It was Attorney Smith's role to advise his client on the potential advantages and disadvantages of Canava's testimony; yet, Defendant Connally interrupted the hearing to present his unsolicited opinion and advise Plaintiff as to the wiser course of action. Only after receiving what amounted to a second legal opinion contradicting his wishes did Plaintiff forfeit his insistence that Canava testify.

As one court noted, trial courts and attorneys should be mindful of the fact that the court has no jurisdiction to render an advisory opinion or determine questions not essential to the decision of an actual controversy, regardless of the fact that such questions may require adjudication in the future.[60]

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[59]Appendix B, p. 11, l. 21.

[60]Centennial Ins. Co. v. Commercial Union Ins. Cos., 803 S.W.2d 479 (Tex. App. -- [14th Dist.] Houston 1991, no writ), citing Firemen's Ins. Co., 442 S.W.2d 331, 333-34 (Tex. 1968).

D. INAPPLICABILITY OF QUALIFIED IMMUNITY FOR DEFENDANT CONNALLY

Because absolute immunity from civil liability for damages is of a "'rare and exceptional character,'" our courts presume that qualified immunity is sufficient "to protect government officials in the exercise of their duties.'"[61] Once Defendant is determined not to be entitled to absolute immunity, the Court must consider whether he retains qualified immunity.

Plaintiff's assertion that Defendant Connally is not entitled to qualified immunity defense is based on a two-fold analysis. Firstly, Plaintiff has shown above that Defendant Connally violated Plaintiff's clearly established constitutional right to counsel and he interfered with the due course of justice by denying Plaintiff his right to obtain a material witness. Secondly, Defendant Connally's conduct was not objectively reasonable, thus preventing him from coming within the protection offered by the doctrine of qualified immunity. The

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[61]Houston v. Partee, 978 F.2d 362, 365 (7th Cir. 1992) (citing Burns v. Reed, -- U.S. at --, 111 S.Ct. at 1939).

applicable standard for qualified immunity is that a public official will be protected from liability "unless his conduct violates 'clearly established statutory or constitutional rights of which a reasonable person would have known.'"[62] Connally cannot plausibly argue that his statements to Plaintiff were made based on his reasonable belief that neither Plaintiff's right to effective assistance of counsel nor his right to call witnesses were constitutionally protected. Moreover, Connally's actions violated our Code of Professional Responsibility.

V.

PROSECUTORIAL IMMUNITY

A. THE LAW OF ABSOLUTE PROSECUTORIAL IMMUNITY

1. Functional Approach

In a recent Supreme Court case, plaintiff Buckley sought damages under 42 U.S.C. § 1983 from prosecutors for allegedly fabricating evidence during the preliminary investigation of a crime

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[62]Coker v. Daniel Constr. Co., 664 F.Supp. 1079 (W.D.Ky. 1987) (citing Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)).

and for false statements made during a press conference announcing an indictment had been returned.[63] The prosecutors relied on the defense of absolute immunity and the court acknowledged that "some officials [who] perform 'special functions'" deserve absolute protection from damages liability.[64] However, the Court also acknowledged that it has been "quite sparing" in recognizing absolute immunity for state actors in § 1983 actions.[65] It is appropriate for this Court to be similarly sparing in granting absolute immunity to Defendant Stevens, not only because of the well-established approach in deciding the level of immunity to be granted, but also because the policy reasons undergirding the immunity doctrine are inapplicable in this instance.

In deciding whether absolute or qualified immunity should be granted, a "'functional approach'" should be applied that looks to "'the

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[63]Buckley v. Fitzsimmons, 113 S.Ct. 2606 (1993).

[64]Id. at 2613, (citing Butz v. Economou, 438 U.S. 478, 506 (1978)).

[65]Id. (citing Forrester v. White, 484 U.S. 219, 224, (1988)).

nature of the function performed, not the identity of the actor who performed it.'"[66] All of Defendant Stevens' acts are therefore not automatically entitled to absolute immunity simply by virtue of his occupation as Assistant District Attorney of Ector County. In its discussion of the functional approach to the immunity question, the Court held that "a state prosecutor had absolute immunity for the initiation and pursuit of a criminal prosecution, including presentation of the state's case at trial."[67] In addition, prosecutors would receive absolute immunity for their conduct that was "'intimately associated with the judicial phase of the criminal process.'"[68] While such an approach may on its surface appear to be a broad grant of absolute immunity for any and all of a prosecutor's acts that are even somewhat related to the state's case, the Buckley Court's implementation of the functional test sharply narrows the immunity

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[66]Id. (citing Forrester, 484 U.S. at 229).

[67]Id. at 2613 (citing Imbler v. Pachtman, 424 U.S. 409 (1976)).

[68]Id. at 2614 (citing Imbler, 424 U.S. at 430).

scope. At the outset, the Court distinguishes between dual roles of a prosecutor: that of an advocate and that of an investigator, the latter being entitled only to qualified immunity.[69]

While the Supreme Court recognizes that absolute immunity is conferred to "the duties of the prosecutor in his role as advocate for the State," which involves "actions preliminary to the initiation of a prosecution and actions apart from the courtroom," the Buckley court explains the Imbler position as granting immunity for acts "which occur in the course of [a prosecutor's] role as an advocate for the State."[70] In other words, for Defendant Stevens to be dismissed on the grounds of absolute immunity, he must have been acting within his role as an advocate for the State. Defendant Stevens' presence in court when Judge Connally made false and inaccurate statements to Plaintiff Sanchez cannot be considered as a part of his advocate's role. Moreover, our State Bar imposes a special duty on prosecutors such

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[69]Id. at 2616.

[70]Id. at 2615.

as Stevens who find themselves in such situations.[71] In fact, Defendant Connally's statements from the bench interfered with the attorney-client relationship between Plaintiff and Attorney Smith. Likewise, Stevens' failure to correct Connally's misstatements is not protected because such a failure to act constitutes a furtherance of the interference with Plaintiff's relationship with his attorney, and that interference cannot be considered a prosecutorial function.[72] There

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[71](B) A public prosecutor or other government lawyer in criminal litigation shall make timely disclosure to counsel for the defendant, or to the defendant if he has no counsel, of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment. TEX. DISCIPLINARY R. PROF. CONDUCT 7-103(B) (1989), *reprinted in* Tex. Gov't Code Ann., tit. 2, sub tit.. G. app. (Vernon 1992) (State Bar Rules art. X, § 9).

[72]Quite to the contrary, such interference can itself destroy effective assistance of counsel. See Strickland v. Washington, 466 U.S. 668, 686 (1984) citing Geders v. United States, 425 U.S. 80, 96 S.Ct. 1330, 47 L.Ed.2d 592 (1976) (bar on attorney-client consultation during overnight recess); Herring v. New York, 422 U.S. 853, 95 S.Ct 2550, 45 L.Ed.2d 593 (1975) (bar on summation at bench trial); Brooks v. Tennessee, 406 U.S. 605, 612-613, 92 S.Ct. 1891, 1895, 32 L.Ed.2d 358 (1972) (requirement that defendant be first defense witness); Ferguson v. Georgia, 365 U.S. 570, 593-596, 81 S.Ct. 756, 768-770, 5 L.Ed.2d 783 (1961) (bar on

is no historical tradition of immunizing an interference into the attorney-client relationship,[73] nor is there a valid policy reason to carve out additional absolute immunities for a prosecutor simply because he is presenting the state's case at trial.

In a factually similar case to Plaintiff's, a former prosecuting attorney was sued for civil rights violations under 42 U.S.C. § 1983 when he concealed the fact that a taped murder confession was obtained subsequent to the accused being administered certain drugs by physicians of a mental health institute.[74] Although the prosecuting attorney assumed office prior to receiving the taped confession, the case was subsequently transferred to a special prosecuting attorney for the county in which the murder allegedly occurred. The taped

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direct examination of defendant).

[73]Such interferences are sufficient to raise questions of Sixth Amendment violations, which if found prejudicial, entitle an accused to relief. The Supreme Court has expressly recognized that a Sixth Amendment violation may be remedied in other proceedings. United States v. Morrison, 449 U.S. 361, 367 (1981).

[74]Triplett v. Azordegan, 570 F.2d 819 (8th Cir. 1978).

confession formed a major part of the trial and was crucial to Triplett's subsequent conviction and incarceration for approximately seventeen years. Triplett was released from incarceration when a county court ruled that the confession was involuntarily given and the County Attorney moved to dismiss all charges, "stating that charges would not have been brought had the information concerning the confession been known."[75]

Triplett argued that the act of obtaining the confession from the institute constituted a part of the prosecuting attorney's investigative or administrative functions rather than his prosecutorial functions, thus negating an absolute immunity defense. Id. However, the court found it unnecessary to address the issue of prosecutorial immunity because the prosecutor did not make use of the illegally obtained confession, thus negating any allegations of a deprivation of a constitutional right. Id. In direct contrast to Triplett, Plaintiff's case indicates that Stevens did make use of Connally's misstatements in

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[75]Id. at 822.

order to secure Plaintiff's conviction. He was able to avoid a material witness (Canava) whom the State certainly could have compelled to testify (following his conviction) if he had had information favorable to the prosecution.[76] The State's case benefited from Defendant Connally's misconduct.

Despite Triplett's argument that the prosecuting attorney's concealment of the facts surrounding the confession at the time of trial and for the next seventeen years amounted to a continuing tort unshielded by the doctrine of prosecutorial immunity, the court found no violation of § 1983 because he was not the prosecuting attorney in the case once it had been transferred to the correct county. Id. Not every act done by a prosecuting attorney can be regarded as being done under color of state law because "[i]t is the nature of the act

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[76]Furthermore, since Canava had been convicted, it would seem that he would be ready to cooperate with the State in return for a reduction in his punishment. The Supreme Court through Chief Justice Earl Warren has observed, "To think that criminals will lie to save their fellows but not to obtain favors from the prosecution for themselves is indeed to clothe the criminal class with more nobility than one might expect to find in the public at large." Washington v. State of Texas, 388 U.S. 14, 22-23 (1967).

performed by a state official, not the status of a state official as such, that is determinative of the applicability of 42 U.S.C. § 1983."[77] Again, Plaintiff's case is distinguishable because throughout his trial, Stevens was the prosecuting attorney both in Plaintiff's case and the Canava companion case.[78] Thus, Stevens' concealment, carried out while Stevens was the Assistant District Attorney assigned to Plaintiff's case, cannot be shielded by absolute immunity.

A final telling factor noted by the Triplett court in its analysis of absolute prosecutorial immunity is its observation that the prosecuting attorney was "in no way responsible for the use of [Triplett's] confession at trial" and that he had "no authority to prevent such use of the confession by [the attorneys in the new

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[77]Id., at 823 (citing Warner v. Croft, 406 F.Supp. 717, 721 (W.D. Oklahoma 1975); Edwards v. Vasel, 349 F.Supp. 164, 166 (E.D. Mo.), *aff'd,* 469 F.2d 338 (8th Cir. 1972); Phillips v. Rockefeller, 321 F.Supp. 516, 521 (S.D.N.Y.), *aff'd,* 435 F.2d 976 (2d Cir. 1971)).

[78]See Affidavit of Preston Stevens, filed in support of his Motion to Dismiss Plaintiff's Complaint.

county]."[79] As a result, any action or inaction by the prosecuting attorney was undertaken in his capacity as a private citizen, and the fact that he was a prosecuting attorney did not alter "the private nature of his failure to come forward with exculpatory information at [Triplett's] trial, or thereafter."[80] As a result, the prosecuting attorney was not found to have deprived Triplett of any constitutional rights and the failure to come forward with exculpatory information at trial and thereafter was not done under color of state law. In Plaintiff's case, Stevens remained the prosecuting attorney throughout Plaintiff's trial, and although not responsible for Connally's decision to misstate the contents of Canava's testimony, Stevens was in a position to prevent Connally from continuing his assurances to Plaintiff that Canava's testimony was harmful to him. Instead, Stevens acted as Connally's "stooge"[81] to carry out repeated denials of Plaintiff's pleas

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[79]Id. at 823.

[80]Id. at 824.

[81]This term is used in its second definition: "one who allows himself to be used for another's profit, puppet." American

for post-conviction relief and help conceal Connally's misstatements about Canava's trial testimony.[82] Stevens, as an officer of the court acting under color of law and on behalf of the State had the knowledge, opportunity, authority, and duty to correct Connally's misstatements and to inform the court of the correct nature of Canava's testimony. Stevens was not acting as a private person during Plaintiff's trial, and because he was in fact acting under color of state law when he failed to come forward with accurate information (that was also exculpatory in nature), Stevens cannot be shielded from Plaintiff's § 1983 claim. Indeed, when the State agreed that Plaintiff should have a new trial in response to his federal habeas corpus application, the State was effectively acknowledging that such a defect existed in its conviction of Plaintiff that he was entitled to the

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Heritage Dictionary (2nd College ed. 1991) p. 1200.

[82]See, e.g., Appendix I (handwritten note delivered to Stevens on July 28, 1989 signed "J.C.," written on back of Plaintiff's unsigned "Order of Setting" filed with his first Application for Writ of Habeas Corpus) and Appendix J (Judge Connally's order denying writ of habeas corpus signed August 30, 1989).

relief sought.[83]

2. Policy Considerations

The policies underlying prosecutorial immunity were examined in a lawsuit in which relatives of two deceased women who had sought but not received protection from the district attorney's office from an abusive husband and former husband brought suit against the district attorney for depriving the women of their civil

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[83]In Kauffman v. Moss a convicted plaintiff sued the district attorney and three law enforcement officers under the Civil Rights Act, 42, U.S.C. §§ 1983 and 1985 alleging they had conspired to achieve his conviction by knowingly using perjured testimony. Kauffman v. Moss, 420 F.2d 1270 (3rd Cir. 1970). The district attorney and law enforcement officers moved to dismiss the complaint pursuant to the district attorney's Rule 12(b)(6) motion based on prosecutorial immunity. Id. at 1272. The court stated the general rule that "[a] state prosecuting attorney is immune from liability under the Civil Rights Act, unless his alleged actions are clearly outside the scope of his jurisdiction." Id., (citing Bauers v. Heisel, 361 F.2d 581 (3rd Cir. 1966)). The court found that the District Attorney was acting within his jurisdiction when he brought a criminal charge against Kauffman for violating a state law "regardless of the allegations that the subsequent conviction was the result of perjured testimony." Id. at 1273.

rights under 42 U.S.C.A. § 1983.[84] The court noted the tradition of common law immunity for prosecutors from civil actions is based upon "the same considerations that underlie the common-law immunities of judges and grand jurors acting within the scope of their duties."[85] Some of those considerations include the concern that unfounded and harassing litigation would deflect the prosecutor's energies from his public duties, as well as the possibility that the prosecutor would cease to exercise his independent judgment "required by his public trust." Id.

Although the concern of unfounded and harassing litigation are legitimate policy concerns, they are inapplicable in this instance. Plaintiff's cause of action is not unfounded, but instead is based on incidents and occurrences that are recorded in the trial transcripts. Plaintiff's complaint against Stevens will not result in Stevens' ceasing to exercise his independent judgment; rather, it is Plaintiff's

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[84]Miller v. Curry, 625 S.W.2d 84 (Tex. App.--Fort Worth 1981).

[85]Id. at 86.

express complaint that Stevens failed to exercise that independent judgment because of his willingness to remain silent in the face of Connally's false and inaccurate statements to him just prior to his trial. If the purpose of this established public policy is to maintain the independence of the prosecution, surely that also includes independence from a judge's wrongful or unlawful influence.

In noting the well-articulated test establishing which prosecutorial acts are within the sphere of his official duties and thus immune, the Texas court stated that the "'[t]ypical situations wherein quasi-judicial immunity exists, regardless of the existence of malice, include the filing of criminal complaints, the institution of proceedings for the arrest or search of persons suspected of criminal activities, the drawing of indictments and information, and similar intrinsically prosecutorial functions.'"[86] As if to emphasize the scarcity of instances in which a prosecutor finds himself immune from suit, this court goes on to say that the law of absolute immunity

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[86]Id. at 87 (citing Sykes v. State of California (Dept. of Motor Vehicles), 497 F.2d 197 (9th Cir. 1874)).

is "well established and clearly defined" as stated in Imbler, Robichaud and Sykes.[87] Plaintiff's position is in accord with that of the Texas court because he too does not wish to expand the scope of absolute prosecutorial immunity. As discussed above, the policy concern of maintaining the independence of a prosecutor's judgement by shielding him with absolute immunity is not served by providing immunity in this instance, so the Miller court's holding that prosecutorial immunity existed based on the Imbler policies are similarly non-applicable here.

B. INAPPLICABILITY OF QUALIFIED PROSECUTORIAL IMMUNITY

Because absolute immunity from civil liability for damages is of a "'rare and exceptional character,'" our courts presume that qualified immunity is sufficient "to protect government officials in the exercise of their duties.'"[88] Since Stevens is not entitled to

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[87]Id. at 87.

[88]Houston, 978 F.2d at 365 (citing Burns, -- U.S. at --, 111 S.Ct. at 1939).

absolute immunity, there remains only the possibility that he will claim protection under the qualified immunity doctrine.

Much like absolute prosecutorial immunity, qualified immunity "'reconciles two competing interests. One interest is the compensation of persons whose federally protected rights have been violated. Opposing this is the fear that personal liability will inhibit public officials in the discharge of their duties.'"[89] As explained above, Stevens was not carrying out a prosecutorial duty but rather was condoning Defendant Connally's false statements, which in turn amounted to an interference with Plaintiff's attorney-client privilege.

Plaintiff's assertion that Defendant Stevens is not entitled to a qualified immunity defense is based on a two-fold analysis. Firstly, Plaintiff has shown above that Defendant Stevens violated Plaintiff's clearly established constitutional right to counsel by affirming Defendant Connally's misstatements as to the contents of Canava's

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[89]Foster v. City of Lake Jackson, 28 F.3d 425 (5th Cir. 1994) (citing Johnston v. City of Houston, 14 F.3d 1056, 1059 (5th Cir. 1994); *accord*, Spann v. Rainey, 987 F.2d 1110, 1114 (5th Cir. 1993).

testimony. Secondly, Defendant Stevens' conduct was not objectively reasonable, thus preventing him from coming within the protection offered by the doctrine of qualified immunity. The applicable standard for qualified immunity is that a public official will be protected from liability "unless his conduct violates 'clearly established statutory or constitutional rights of which a reasonable person would have known.'"[90] Stevens cannot plausibly argue that he maintained his silence in the face of Connally's statements that he personally knew were false based on his reasonable belief that Connally's interference with Plaintiff's attorney-client relationship or Connally's denial of Plaintiff's right to new counsel was not a statutory or constitutional violation. Moreover, Stevens' actions violated our Code of Professional Responsibility.

Stevens' silence contributed to and made possible Connally's denial of Plaintiff's right to effective counsel and his interference in Plaintiff's attorney-client relationship. That silence in these

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[90]Coker., 664 F.Supp. 1079 (citing Harlow, 457 U.S. at 818).

circumstances violates DR 7-103 of the Texas Rules of Professional Responsibility: "A public prosecutor or other government lawyer in criminal litigation shall make timely disclosure to counsel for the defendant, or to the defendant if the defendant is not represented by a lawyer, of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the accused or mitigate the degree of the offense." TEX. R. DISCIPLINARY P. 2.16 (1992). Since Stevens is an officer of the court, his silence in the face of Connally's deliberate falsehoods that no exculpatory evidence existed and that Canava's testimony would actually harm Plaintiff "raises very serious questions."[91]

VI.

CONTINUING CONSPIRACIES NOT ENTITLED TO IMMUNITY

". . . Section 1983 is applicable in the case of acts of omission as well as commission."[92] In order to prove a civil conspiracy, two or

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[91]Houston, 978 F.2d at 369.

[92]Azar v. Conley, 456 F.2d 1382, 1387 (6th Cir. 1972).

more persons must act in concert to commit an unlawful act with the principal element being an agreement between the parties "'to inflict a wrong against or injury upon another,' and 'an overt act that results in damage.'"[93] To demonstrate that a conspiratorial agreement exists, it must be shown "that there was 'a single plan, the essential nature and general scope of which [was] known to each person who is to be held responsible for its consequences.'"[94] In other words, circumstantial evidence of an express agreement may be adequate to prove the existence of a conspiracy.[95]

Plaintiff's cause of action against Connally, Stevens and Orras for conspiracy should not be dismissed because Plaintiff's Second Amended Complaint has established an affirmative link between the occurrence of Connally's misstatements and Stevens and Orras'

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[93]Bell v. City of Milwaukee, 764 F.2d 1205, 1255 (7th Cir. 1984) (citing Rotermund v. United States Steel Corp., 474 F.2d 1139 (8th Cir. 1973) (citation omitted)).

[94]Id. (citing Hoffman-LaRoche v. Greenberg, Inc., 447 F.2d 872, 875 (7th Cir. 1971)).

[95]Id. at 1255.

subsequent acquiescence in those misstatements.[96] As a result, Plaintiff has "'[a]t a minimum'" shown that Stevens and Orras "'at least implicitly authorized, approved, or knowingly acquiesced in the unconstitutional conduct of Connally.'"[97] Instead of revealing the falsity of Connally's statements that Canava's testimony would hurt Plaintiff, Stevens and Orras chose to remain silent, and they perpetuated the conspiracy by not later revealing the true content of his testimony even after the Canava trial record became available to them, clearly reflecting Canava's exercise of his 5th Amendment right before a judge other than Defendant Connally.

In addition, Connally's and Smith's participation and affiliation with the cover-up is shown by Connally's disingenuous finding of facts[98] and by Smith's affidavit,[99] both of which were

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[96]Id. at 1256 (citing Rizzo v. Goode, 423 U.S. 362, 371).

[97]Id. (citing Hays v. Jefferson County, Kentucky, 668 F.2d 869, 873-74 (6th Cir.), *cert. denied*, (459 U.S. 833).

[98]See Appendix E.

[99]See Appendix F.

requested by the Court of Criminal Appeals.[100] In Connally's statement of facts, he omits any references to the hearing in which Plaintiff requested substitution of counsel.[101] During that hearing, Plaintiff requested new counsel who would follow his instructions to have Canava called as a testifying witness on his behalf.[102] Such an opportune omission misleads the Court of Criminal Appeals into believing that there really was no "problem concerning the testimony of Reymundo Canava" as asserted by Connally, when in fact it was precisely this 'problem' of not obtaining the exculpating Canava testimony that led to Plaintiff's attempt to discharge his lawyer in the hearing over which Connally "presided." Ironically, if Connally had, by judicial act, denied Plaintiff the right to call Canava, then that act, although possibly immunized, could have been plainly visible in the trial record reviewed on appeal by the Appeals Court and on habeas

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[100]See Appendix D. See also, Bell, 746 F.2d at 1257.

[101]Appendix E.

[102]See generally Appendix B.

corpus by the Court of Criminal Appeals. Since Connally was acting outside his judicial role by advising Plaintiff on the harmfulness of Canava's testimony while appearing to allow him to change lawyers,[103] his non-judicial acts could be easily concealed and buried. There were no written pleadings or orders, no docket entries or notations, and no references to any of these events in his Findings of Fact or Conclusions of Law, which he only prepared after being ordered to do so by the Court of Criminal Appeals.[104]

A deliberate alteration of the trial transcript by the court reporter so that the Allen charge given to the jury is weakened is not shielded by an absolute immunity defense.[105] Connally's material

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[103]See Appendix B, p. 15, ll. 3-6: *THE COURT: . . . I want the record to reflect that Mr. Smith has urged that the motion be granted and that the District Attorney has stated that he has no objection to it.*

[104]Appendix D. See also Ex Parte Carnes, 579 S.W.2d 249 (Tex.Crim.App. 1979) (cited by the Court's order for the proposition that the trial court's "summary conclusion" that Plaintiff's habeas corpus application "has no merit" is "not supported by the record.").

[105]Odom v. Wilson, 517 F. Supp. 474 (S.D. Ohio 1981).

omissions and misleading statements in his Findings of Fact and Conclusions of Law amount to an alteration of the trial record and thus should be regarded as a non-judicial act for which he receives no protection.[106]

Smith's affidavit to the Appeals Court is a similar alteration of Canava's trial transcript in that it contains an outright falsity. Smith states that "*Reymundo Conava [sic] had previously testified in his own trial, that the controlled substance, the subject of the criminal case, belonged to Eugene Rio Sanchez.*"[107] Since the Canava transcript had presumably been available since February 4, 1988[108] at the time that Smith signed his affidavit on November 21,

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[106]Defendant Connally was specifically ". . . ordered to supplement the record with an affidavit from trial counsel answering the applicant's allegations regarding the failure to call the co-defendant to testify. The trial court should also make findings of fact and conclusions of law which it deems relevant and appropriate to the disposition of the applicant's application for habeas corpus relief." Appendix D.

[107]Appendix F.

[108]Appendix B, p. 11.

1989, it is unclear how Smith obtained his knowledge regarding the contents of Canava's trial testimony and how he could have gotten it so wrong. Regardless, Smith's affidavit constitutes a continuing misrepresentation of Connally's assertions to Sanchez just prior to his trial, and it also constitutes an outright misrepresentation to the Court of Criminal Appeals. In addition, Smith's continued misrepresentations reflect his continued participation and affiliation in the conspiracy to cover-up Connally's misstatements and Stevens' acquiescence in these falsehoods at the time of Plaintiff's trial.

A prosecutor who discovers but fails to disclose exonerating evidence after a criminal defendant has been convicted, sentenced and imprisoned, thus causing the defendant to languish in prison for several years, is not absolutely immune from § 1983 liability.[109] The policy reasons enunciated in Imbler and Buckley are not in danger of being discounted by the Houston holding because a reliance on the courts to protect the rights of someone who has been unjustly

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[109]Houston v. Partee, 758 F. Supp. 1228 (N.D. Ill. E.D. 1991).

convicted "is directly subverted by the prosecutor who knowingly and actively withholds subsequently-learned material evidence that would enable the courts to right the wrong of the unjust conviction and by the prosecutor who actively misrepresents those latter-learned facts to the courts."[110]

Both before and after Stevens succeeded in obtaining Plaintiff's conviction, he had access to the Canava trial transcript. Both Canava's attorney and the State filed their appellate briefs in Canava's appeal between November 1987 and May 1988.[111] At this point, Stevens, who was the prosecutor in Canava's trial, must have been reminded of Canava's twenty-two lines of testimony in which he stated that he did not want to testify in no way harmed Plaintiff.[112] In fact, Canava's testimony could be interpreted as being helpful to Plaintiff.

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[110]Id. at 1231.

[111]Canava v. State of Texas, No. 08-87-00228-CR, In the Court of Appeals of the Eighth Judicial District of Texas

[112]Appendix O (testimony of Canava).

That Stevens, despite being armed with this information, did not come forward with this exculpatory information indicates that Stevens from this point onwards was affirmatively participating in a cover-up. Defendant Stevens was undoubtedly motivated not only by his desire for Plaintiff's conviction to remain upheld, but also by his desire to protect Connally and himself from the ramifications of their false statements.

Once Plaintiff's conviction was obtained, Connally began to recharacterize what he had done to Plaintiff. In the hearing on Motion for New Trial, he made it appear to Plaintiff's new attorney that Smith had expressed concern that Canava was not present as a witness[113] when the truth is that he had told Plaintiff that "*perhaps the fact that he was not here would be more in your favor than if he were*

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[113]Defendant Connally stated to Mr. McLeaish, after denying Plaintiff's Motion for New Trial: "*With just the added comment that I also tried Mr. Canava and that Mr. Smith raised the point that he thought Mr. Canava would be here as a State's witness and at that time, I was able to tell him that I sure did not think that Mr. Canava would be of any help to them unless he perjured himself.*" Appendix C, p. 36, ll. 9-15 (emphasis added).

here."[114] Defendant Connally continued to deny Plaintiff any further relief by refusing to grant either of Plaintiff's two applications for state habeas corpus writs. Both writ applications were submitted to Connally, and on both occasions he denied Plaintiff any relief. After receiving Defendant Connally's misleading findings and Smith's false affidavit, the Court of Criminal Appeals denied relief.[115] Plaintiff's second state habeas corpus writ contains numerous references to the transcript from the Canava trial in an attempt to show that Canava's testimony was not in fact harmful to Plaintiff, that Connally misrepresented the nature of Canava's testimony, and that Canava should have been called as a witness for Plaintiff as was requested by Plaintiff. Still Connally granted Plaintiff no relief. After Plaintiff filed a federal writ of habeas corpus, however, which contained virtually identical references to the Canava trial transcript as did Plaintiff's second state habeas corpus writ, Plaintiff was granted a

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[114]Appendix B, p. 9, ll. 2-6.

[115]Appendix G.

new trial, and the State later dismissed its prosecution. In other words, Defendant Connally's two denials of Plaintiff's state habeas corpus writs represent his attempts to cover-up the misstatements and fake advice he had given Plaintiff regarding the content and effect of Canava's probable testimony on Plaintiff's trial. The fact that Plaintiff's federal writ of habeas corpus was granted and was almost identical to Plaintiff's prior state writ application submitted to Connally clearly establishes Connally's derogation of his judicial duties in order to cover up his non-judicial and unconstitutional acts, acts which cost Plaintiff more than five years and seven months in prison.

VII.

QUALIFIED IMMUNITY INAPPLICABLE TO DEFENDANT ORRAS

A. THE FACTS

On December 3, 1986, Defendant Orras, working as an undercover police officer, approached Reymundo Canava to purchase a "paper" of heroin for $25.00. The transaction occurred in front of

Canava's residence, in an automobile furnished by Orras, and was under surveillance by other police officers 200 to 300 yards away. In the course of the transaction, Plaintiff arrived at Canava's residence in a Yellow Cordoba automobile. Canava then got out of Orras' car and got into Plaintiff's Cordoba. Plaintiff then purchased a "paper" of heroin from Canava for $25.00. Although Orras and the officers who were conducting surveillance did not see exactly what occurred in the Cordoba, they did see Canava and Plaintiff exchange something. After Canava got out of Plaintiff's Cordoba, Plaintiff departed and Canava returned to Orras' vehicle and sold heroin to Orras. On or about February 11, 1987, both Canava and Plaintiff were arrested for the sale of heroin to Orras. Furthermore, Plaintiff's 1978 Chrysler Cordoba automobile was seized pursuant to a civil forfeiture action. The arrests and forfeiture stemmed from the December 3, 1986 transaction and police observation of Plaintiff at the scene.

Defendant Stevens was the prosecutor for Plaintiff's trial, and

in the course of the trial, he knowingly or recklessly elicited perjured testimony from Defendant Orras regarding the circumstances of the December 3, 1986 transactions. During the Canava trial, Orras testified that he was situated about 30 feet away from the car in which Canava and Plaintiff allegedly carried out their exchange.[116] However, at Plaintiff's trial seven months later, Orras testified that the distance was actually 8 to 10 feet away.[117]

At Plaintiff's trial, Orras testified, in effect, that he had witnessed Canava take money out of his pocket and hand it to Plaintiff, and Plaintiff hand something over to Canava.[118] However, this was contrary to the facts and Orras' previous testimony in

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[116]See excerpts from Appendix J, Canava Cause No. C-18,564, S.F. Vol. III, pg. 18 lines 8-24, which is attached as Appendix P.

[117]See excerpts from Appendix P, Sanchez, Cause No. C-18,541, S.F. Vol. V. pg. 16 line 2; pg. 27 lines 19-23; pg. 30 lines 1-4, which is attached as Appendix P.

[118]See Plaintiff's second Post-Conviction Application for Writ of Habeas Corpus in the Texas Court of Criminal Appeals which is attached as Appendix P.

Canava's trial in which he stated he had seen Canava holding the $25.00 received from Orras for the heroin.[119] Although Orras did not testify at the Canava trial that he observed Canava hand Plaintiff anything[120], he testified at Plaintiff's trial that Canava placed Plaintiff's $25.00 in his shirt pocket and later took the money out of his pocket and handed it to Plaintiff.[121] During the Canava trial, Orras did not testify that he saw Canava hand money to Plaintiff; rather, he testified that he saw "objects" changing hands.[122] Approximately seven months later when Orras was testifying during Plaintiff's trial,

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[119]See excerpt from Appendix J, Canava S.F. Vol. III, pg. 10, lines 20-25, attached as Plaintiff's Appendix P.

[120]See excerpt from Appendix J, pg. 11, lines 9-20 attached as Plaintiff's Appendix P.

[121]See excerpt from Appendix P, Sanchez, S.F. Vol. V, pg. 17 line 24 - pg. 18 line 3; pg. 27 line 24 - pg. 28 line 6; pg. 30 lines 15-18 attached as Plaintiff's Appendix P.

[122]See excerpt from Appendix J, pg. 11 lines 3-20; pg. 19 lines 4-8 attached as Plaintiff's Appendix P.

Orras stated that he did in fact see Canava hand Plaintiff $25.00.[123]

On information and belief, Defendant Stevens knew, prior to the commencement of Plaintiff's trial that the facts that Orras proffered to him as his trial testimony in Plaintiff's prosecution were materially different from his Canava trial testimony because Stevens prosecuted Canava as well as Plaintiff. Stevens was also aware that Judge Lewis had presided over the Canava trial and that Canava had not testified to implicate Plaintiff in this trial. He also knew that Judge Connally had not presided over that trial or heard Canava's testimony as he represented to Plaintiff.

B. THE LAW

"Police officers, of course, are not immune from liability under the Civil Rights Act."[124] The Fifth Circuit has found that "[d]eliberately concealing or deliberately failing to disclose

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[123] See excerpt from Appendix P, pg. 17 line 21 - pg. 18 line 5; pg. 27 line 24 - pg. 28 line 6; pg. 30 lines 5-18 attached as Plaintiff's Appendix P.

[124]

exculpatory evidence, like 'maliciously tendering false information,' can [...] form the basis for an inference that a defendant police officer acted with malice in initiating and maintaining a prosecution."[125] Furthermore, when a jury finds that defendants concealed and misrepresented facts to the prosecutor which likely influenced his decision of whether or not to continue the prosecution, then those defendants can be liable under § 1983 for malicious prosecution.[126]

Certain immunities were so well established in 1871 when § 1983 was enacted that Congress would have specifically provided for their abrogation if it had so intended.[127] "Most public officials are entitled only to qualified immunity."[128] Under this immunity, government officials are not subject to damages liability "when 'their conduct does not violate clearly established statutory or constitutional

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[125]Sanders v. English, 950 F.2d 1152, 1163 (5th Cir. 1992).

[126]Doe v. Louisiana, 974 F.2d 36, 38 (5th Cir. 1992).

[127]Buckley v. Fitzsimmons, 113 S.Ct. 2606, 2613 (1993).

[128]Id., (citing Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982); Butz v. Economou, 438 U.S. 478, 508 (1978)).

rights of which a reasonable person would have known.'"[129]

Under common law, there is a "subtle but crucial" distinction between two categories of witnesses and their immunity for false testimony: "police officers are immune from section 1983 liability based on their testimony as witnesses at trial," but "officers are not immune from liability if they can be considered to be complaining witnesses."[130] In an action for malicious prosecution, "the complaining witness was sought to be held liable for his role in *initiating* a baseless prosecution, and 'complaining witnesses were not absolutely immune at common law.'"[131] What must be proved is that "the party who made the complaint had no probable cause for believing that the charge was true."[132] When "the constitutional tort

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[129]Id., (citing Harlow, 457 U.S. at 818).

[130]White v. Frank, 855 F.2d 956, 957-58 (2nd Cir. 1988).

[131]Id. at 959 (citing Malley v. Briggs, 106 S.Ct. 1092, 1096 (1986)).

[132]Id. (citing Hastings v. Lusk, 22 Wend. 410 (N.Y. 1839)). See also Perkins v. Mitchell, 31 Barb. 461, 468 (N.Y. Sup. Ct. 1860)(comparing false, malicious or defamatory statements made

is the action of a police officer in initiating a baseless prosecution, his role as a 'complaining witness' renders him liable to the victim under section 1983, just as it did at common law, and the fact that his testimony at a judicial proceeding may have been the means by which he initiated the prosecution does not permit him to transpose the immunity available for defamation as a defense to malicious prosecution."[133]

C. APPLICATION OF LAW TO FACTS

Orras' statements described above regarding the transaction that occurred on December 3, 1986 between Plaintiff and Canava were unfounded and maliciously intended. Orras lacked probable cause in asserting that Plaintiff was distributing a controlled substance to Canava because neither Orras nor the other officers saw Plaintiff sell anything to Canava. No heroin was ever viewed in

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by witness during trial to those made resulting in charges being brought); Geter v. Fortenberry, 849 F.2d 1550 (5th Cir. 1988)(holding that testifying police officers enjoy immunity for malicious prosecution whereas complaining witnesses do not).

[133]Id. at 961.

Plaintiff's possession or seized from his vehicle. Because Orras' statements initiated the State's charge against Plaintiff, those statements were those of a complaining witness and not merely of a testifying witness. Under White, Orras' role as a complaining witness does not entitle him to immunity for his acts of initiating a baseless prosecution.

Since Plaintiff has a constitutional right to be free of malicious prosecution, and since Orras' false information was maliciously tendered for the effect of initiating a charge against Plaintiff, Plaintiff has also successfully made out a claim for malicious prosecution under § 1983. Section 1983 does not offer Orras any immunity protection for malicious prosecution; rather, it recognizes and protects Plaintiff's constitutional right to be free of such tort.[134]

A single, minor inconsistency in Orras' testimony may be understandable considering that approximately seven months had

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[134]Sanders, 950 F.2d at 1163.

elapsed between the Canava trial and Plaintiff's trial. As summarized above, however, Orras' testimony reflects more than a single inconsistency, and no single inconsistency can be regarded as minor.

D. THE ORRAS-STEVENS CONSPIRACY

Orras conspired with Stevens insofar as Orras allowed Stevens to elicit perjured testimony (markedly inconsistent with his Canava trial testimony) from him which neither Orras nor Stevens corrected. Orras' objective in altering his testimony on material points at Plaintiff's trial was to assist Stevens in order to convict Plaintiff. The fact that Orras and Stevens concealed these material differences by not responding to discovery or disclosing any of Orras' prior statements to Plaintiff or his attonrey is sufficient circumstantial evidence of a meeting of the minds between Orras and Stevens. If Stevens had pointed out Orras' testimonial inconsistencies, it would have come to light that the supposed sale of an illegal substance by Plaintiff to Canava was not actually witnessed by Orras or any other officer, and this in turn would have significantly weakened the State's

case and resulted in Plaintiff's acquittal. Because Orras purposely changed his prior testimony in such a way as to be detrimental to Plaintiff, and because Stevens failed to remedy that perjury,[135] there exists sufficient circumstantial evidence that there was, at the very least, an understanding, perhaps even an express agreement, between Stevens and Orras that they would offer perjured testimony in order to convict Plaintiff.[136]

Plaintiff asked for any exculpatory witness statements via discovery requests.[137] Orras' testimony in the Canava trial is exculpatory based on the facts as stated in Section VII above. Because Orras' testimony in the Canava trial was too weak to convict Plaintiff, it was necessary to strengthen that testimony during

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[135]As a public prosecutor, Stevens had a duty to disclose Orras' inconsistencies in testimony to defendant's counsel. TEX. R. DISCIPLINARY P. DR7-103(b).

[136]Green v. State Bar of Texas, 27 F.3d 1083, 1089 (5th Cir. 1994).

[137]See Appendix M (Sanchez's Moition for Production of Witness Statements) and Appendix N (Motion for Discovery and Inspection of Evidence).

Plaintiff's trial in order to convict him. The altered testimony renders Orras' testimony in the Canava trial exculpatory and at the very least questionable.

VIII.

CONCLUSION

As a result of the factual allegations pertaining to Connally contained in paragraphs 17 - 19, and 22 of Section III, and Section IV, D of Plaintiff's First Amended Complaint, together with Plaintiff's arguments, authorities and appendices discussed above, Defendant Connally has not and cannot show beyond a doubt that Plaintiff will be unable to prove a set of facts establishing his entitlement to the relief sought. Therefore, Defendant Connally's Motion to Dismiss must be denied.

Similarly, the factual allegations regarding Defendant Stevens as contained in paragraphs 20 - 22 of Section III, and Section IV, C of Plaintiff's First Amended Complaint, in combination with Plaintiff's authorities and appendices discussed above demonstrate

that Defendant Stevens cannot show beyond doubt that Plaintiff will be unable to move his claims against him and so his Motion to Dismiss must be denied.

Finally, the factual allegations regarding Orras as contained in paragraphs 13 - 18, and 20 - 25 of Section III, and Section IV, A of Plaintiff's First Amended Complaint, together with Plaintiff's authorities and appendices discussed above show that Defendant Orras has not and cannot show a reasonable doubt that Plaintiff cannot prove a set of facts establishing his entitlement to the relief sought as is required of any defendant who would prevail in a motion to dismiss under Fed. R. Civ. P. 12(b)(6).

For the reasons stated, Defendants' pending motions should be denied in all things.

Respectfully submitted,

RICHARD W. ALEXANDER, P.C.
ATTORNEY & COUNSELOR AT LAW

By: /S/

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EUJENIO R. SANCHEZ

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Plaintiff's Brief on Official Immunity has been served via certified mail, return receipt requested to the following counsel of record on the ____ day of October, 1995:

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/S/
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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

EUJENIO R. SANCHEZ,	§	
	§	
PLAINTIFF	§	
	§	
V.	§	Civil Action No.MO95CA039
	§	
ECTOR COUNTY, TEXAS;	§	
CITY OF ODESSA, TEXAS;	§	
LOUIS ORRAS;	§	
JOE CONNALLY;	§	
JOHN SMITH, IN HIS	§	
OFFICIAL CAPACITY;	§	
PRESTON STEVENS;	§	
244TH JUDICIAL	§	
DISTRICT COURT	§	
OF THE STATE OF TEXAS;	§	
OFFICE OF THE DISTRICT	§	
ATTORNEY FOR	§	
ECTOR COUNTY,	§	
	§	
DEFENDANTS	§	

APPENDICES A - P
TO
PLAINTIFF'S BRIEF ON OFFICIAL IMMUNITY

October 20, 1995

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APPENDIX B: State v. Sanchez, No. C-18,541, Motion to Substitute Counsel

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APPENDIX D: Ex Parte Eugene Rios Sanchez, Writ No. 20,701-01, Order

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APPENDIX H: Criminal Docket, C-18,541

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APPENDIX K: Affidavit of Eugene Rios Sanchez (attached as Appendix O to Post-Conviction Application for Writ of Habeas Corpus and Federal

Petition for Writ of Habeas Corpus.)

APPENDIX L: Affidavit of Reymundo Canava (attached as Appendix OO to Post-Conviction Application for Writ of Habeas Corpus and Federal Petition for Writ of Habeas Corpus.)

APPENDIX M: State v. Sanchez, No. C-18,541, Motion for Production of Witnesses Statements

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APPENDIX O: Testimony of Reymundo Ybarra Canava, State v. Canava, No. C-18,564, Record on Appeal, Volume III of IV Volumes, Trial on the Merits, pages 55-56

APPENDIX P: Post Conviction Application for Writ of Habeas Corpus, Ex Parte Sanchez, pages 16-18, and attachments:

Appendix J (testimony of Louis Orras in State v. Canava, No. C-18,564, pages 5-21).

Appendix P (testimony of Louis Orras in State v. Sanchez, No. C-18,541, pages 11-30)

APPENDIX F

State of Texas x
County of Potter x

AFFIDAVIT

I, EUGENE RIOS SANCHEZ, hereby swear that the following is true and correct:

Before my trial on Cause No. C-18,541, I told my lawyer, John Smith, to subpoena my codefendant, Reymundo Canava, so that he could testify in my trial.

When Canava and I were arrested for a delivery of heroin charge, we met in the city of Odessa jail. This was around February 11, 1987. At that time, Canava told me that he would testify to the truth that I had nothing to do with his sale of heroin to an undercover agent named Louis Orras.

On the day of trial, my trial, I found out Canava wasn't there. My lawyer refused to subpoena him, saying that his trial strategy was not to call my codefendant because he, my lawyer, felt that Canava's testimony would hurt my case.

During a hearing on my motion to change lawyers, Judge Connally told me that he had tried the Canava case, meaning the same case for delivery of heroin I was not being tried for, and that he had heard Canava testify against me and that his testimony was harmful to me. Judge Connally also told me to take his work for it that all of this was the truth. Mr. Connally being an honorable judge, I believed everything he told me.

If judge Connally had not convinced me that my codefendant's testimony would be harmful to me and that I should not call him as a witness, I would have insisted that Canava be called as a witness in my trial, even if it meant changing lawyers,

as John Smith refused to call my codefendant to testify.

When I got to the penitentiary, I spoke to Canava and also looked at his records in this case. I now realize that everything Judge Connally said was completely untrue. Canava asked me why my lawyer never spoke with him and why he wasn't called as a witness in my trial, saying that he was and is willing to testify that I had nothing to do at all with his sale of heroin to Officer Orras.

Executed on: January 24th., 1991 /S/
EUGENE RIOS SANCHEZ
TDC NO. 474019
W.P. Clements Unit
9601 N.E.24th. Avenue
Amarillo, Texas 79107

Sworn and Subscribed to before
me on this 24th. of January, 1991. /S/
LT.J.M.MAY,NOTARY PUBLIC
POTTER COUNTY, TEXAS
MY COMMISSION EXPIRES MAY 16, 1993

APPENDIX G

STATE OF TEXAS x
COUNTY OF POTTER x

AFFIDAVIT

I, REYMUNDO CANAVA, swear that the following statement if true and correct:

On December 3, 1986, around 8:30 in the morning, I received a phone call from Eugene Sanchez, a person I have known for many years. Sanchez was a friend but he was also a customer, meaning he bought heroin from me on different occasions.

Sanchez asked if I had any $25 papers of heroin for sale. My answer was yes, and for him to come over and pick it up. Sanchez told me he would be over in about 15-20 minutes. At the time, I was living at 308 Lindberg street in Odessa, Texas.

Ten or fifteen minutes later there was a knock on my door. As I opened the door, a person that I knew as Juan was standing there. Juan had purchased heroin from me before, yet I didn't really know or trust him to well. He might try and rob me of my heroin, which has happened before, by other persons.

when Juan asked me if I had any heroin there, I said no. He then asked if I could score some for him and I told him that I probably could. I then told him to wait outside and I'd be out in a few minutes. I closed the door and then got two $25 papers of heroin from my hiding place. I go outside and get in Juans car which was parked in front of my house.

Juan gave me 425 and asked where we were going. I told him to wait a minute so I could think where we could go. At that time, Sanchez pulled in the driveway in his yellow Cordoba and parked about 30 to 40 feet away from us. I get out of Juans car,

walked over and got into Sanchez car. I handed Sanchez his $25 paper of heroin, he hands me the money and then leaves. I walk back to Juans car and hand him his $25 paper through the window. Juan leaves and I go back into my house.

On February 11, 1987, I was arrested for that sale of heroin to Juan, but now I find out that he is an undercover cop names Louis Orras. While I'm in the city jail, I meet Eugene Sanchez and find out that he was also arrested for my sale of heroin to the undercover cop.

I told Sanchez that I knew he had nothing to do with this charge and that I would testify for him if he was tried. I told him to have his lawyer call me as a witness, and he said he would.

Two and a half years later, I meet Sanchez in the penitentiary. He told me had got a life sentence for that sale of heroin I made to officer Orras. I asked Sanchez why he didn't call me as a witness? He explained that his lawyer refused to call me because it was some kind of trial strategy, and the lawyer said my testimony would hurt Sanchez because I had testified against him in my trial, which isn't true. Sanchez also told me that Judge Connally convinced him that he had been the judge in my sale of heroin case and had heard me testify against Sanchez, or in some way that would hurt his case, and because of this Judge Connally convinced Sanchez that he shouldn't call me as a witness. I told Sanchez that none of this stuff was true and let him read the records in my case for the delivery to Officer Orras and some of the records in a different case for possession.

Sanchez did not know anything about Orras or any of my other customers and he had nothing to do with my sale of heroin to Orras on December 3, 1986, or any of my other sales. Sanchez was only a customer of mine and nothing more than that.

John Smith, Sanchez trial lawyer, at no time did he interview or discuss anything with me about Sanchez trial nor did

he attempt to have me subpoena to testify in Sanchez trial.

If John Smith had called me to testify at Eugene Sanchez trial, I would have said everything I am saying in this affidavit, and that Sanchez had nothing to do with my sale of heroin to the undercover cop on December 3, 1986.

The only thing I said in my trial for this sale to officer Orras was that I wasn't going to testify and nothing else. In my possession trial, I didn't testify to even that.

Everything I have said in this affidavit is true in every way, under the penalty of perjury.

Date: January 24, 1991

/S/
REYMUNDO CANAVA
TDC NO.. 467494
CLEMENTS UNITS
9601 NE 24th. Avenue
Amarillo, TX 79107

BEFORE ME, THE UNDERSIGNED AUTHORITY, ON THIS DAY PERSONALLY APPEARED REYMUNDO CANAVA, TDC NO. 467393, KNOWN TO ME TO BE THE PERSON WHOSE NAME IS SUBSCRIBED TO THE FOREGOING AFFIDAVIT.

GIVEN UNDER MY HAND AND SEAL OF OFFICE ON THIS 24th DAY OF JANUARY, 1991.

/S/
LT.J.M.MAY,NOTARY PUBLIC
FOR POTTER COUNTY, TEXAS

MY COMMISSION EXPIRES ON

May 16, 1993